Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

TIMOTHY B. HUFFMAN,
Petitioner,

v.

THE PEOPLE OF THE STATE OF MICHIGAN,
Respondent.

On Petition for a Writ of Certiorari to the Michigan Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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May 12, 2006

QUESTIONS PRESENTED

1. Whether Petitioner's conviction under Michigan's "open or indecent exposure" law for arranging for the transmission of a cable television program containing nudity deemed "offensive" violates the First Amendment?

2. Whether the Michigan Court of Appeals' unprecedented and unforeseeable application of a public indecency statute to Petitioner's televised nudity violates the fair warning requirement embodied in the Due Process Clause of the Fourteenth Amendment?

PARTIES TO THE PROCEEDING

The caption of the case contains the names of all parties to the proceeding in the court whose judgment is sought to be reviewed.

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OPINIONS BELOW

The Michigan Supreme Court's order denying leave to appeal is reported at 708 N.W.2d 95. Pet. App. 1a. The opinion of the Michigan Court of Appeals affirming Petitioner's conviction is reported at 702 N.W.2d 621. Pet. App. 2a-18a. The Kent County Circuit Court's opinions affirming Petitioner's conviction and denying Petitioner's interlocutory appeal are unreported. Pet. App. 19a-60a. The trial court opinion denying Petitioner's motion to dismiss is unreported. Pet. App. 61a-71a.

JURISDICTION

The Michigan Court of Appeals entered its judgment on May 10, 2005. The Michigan Supreme Court denied a timely petition for leave to appeal on January 12, 2006, with two Justices dissenting. On March 29, 2006, Justice Stevens granted Petitioner's application for a 30-day extension of the time to file a petition for writ of certiorari. This Court's jurisdiction rests on 28 U.S.C. § 1257.

STATUTES INVOLVED

This case involves application of the First Amendment, the Due Process Clause of the Fourteenth Amendment, and Michigan Penal Code § 335a. The pertinent provisions are reproduced at Pet. App. 72a-73a.

STATEMENT OF THE CASE

A. Petitioner's Television Program And Arrest

Petitioner Timothy Huffman was convicted under Michigan's public indecency statute for the broadcast of a television program over GRTV, a public access cable channel in Grand Rapids, Michigan. Pet. App. 4a. Petitioner's show, called "Tim's Area of Control," is regularly shown on GRTV. At issue here is the sixty-eighth episode shown on March 31, 2000, and April 7, 2000. Pet.

App. 3a. In accordance with GRTV rules restricting adult content to nighttime hours, Petitioner directed GRTV to show the program only after 10:00 p.m., and the episodes were televised between 10:30 p.m. and 11:00 p.m. *See* GRTV Application for Cablecast & Statement of Compliance for Episode 68 (Mar. 30, 2000), marked as People's Trial Ex. 1; *see also* Trial Tr. at 47-48; Pet. App. 3a. The half-hour episode featured a number of music and comedy acts, as well as a public service announcement. *See* Summary of "Episode 68" of "Tim's Zone of Control," Ex. B to Defendant-Appellant's Application For Leave to Appeal, Docket No. 252315 (Mich. Ct. App. filed Nov. 24, 2003). Petitioner's conviction stems from a three-minute segment near the end of the program. The segment, a short comedy skit, shows "a flaccid penis and testicles marked with facial features," playing the role of "Dick Smart," a comedian performing an act at a comedy club without much success. Pet. App. 3a. The "Dick Smart" character makes a series of comedic double entendres, noting for example that he had been in the Army prior to becoming a comedian but that he mostly "just hung around" instead of working. Pet. App. 3a & n.1. Although perhaps crass, the routine is not sexual – there is no hint of eroticism in either the images displayed or the accompanying monologue. It is simply a comedy act depicting the travails of a humanized set of genitals attempting, and failing at, stand-up comedy.

GRTV received a single complaint about Petitioner's program from an adult viewer who testified at trial that she "stopped for a second, just to make sure I was seeing what I was actually seeing, and I watched it for at least a minute." Trial Tr. at 24. There is no indication that any child ever viewed Petitioner's program, which was televised at 10:30 p.m. The Grand Rapids Police Department executed a search warrant on Petitioner's home, where they seized a tape containing the episode triggering the complaint. Pet. App.

4a.[1] Petitioner voluntarily submitted to arrest, and was charged with violation of Michigan's "open or indecent exposure" statute, providing that "[a]ny person who shall knowingly make any open or indecent exposure of his or her person or of the person of another shall be guilty of a misdemeanor . . . ." Mich. Comp. Laws § 750.335a (2000).

B. Proceedings Below

In the trial court Petitioner moved to dismiss the prosecution on the ground that he could not be held criminally liable under § 750.335a for broadcasting nudity on cable television. Pet. App. 20a. After the motion was denied, Petitioner filed an interlocutory appeal in the Circuit Court for Kent County, Michigan. Pet. App. 21a. That appeal was denied, and following a jury trial, Petitioner was convicted on January 7, 2003. Pet. App. 22a. Petitioner was sentenced to one day in jail, with credit for time served, and twelve months of probation. He was also fined $500 and ordered to pay an additional $525 in costs. Pet. App. 4a.

Petitioner appealed his conviction to the Circuit Court on the grounds that the indecent exposure statute does not apply to televised images and that if it does, the statute violates the First and Fourteenth Amendments. On November 3, 2003, the Circuit Court rejected Petitioner's constitutional claims and affirmed his conviction. Pet. App. 19a-50a.[2]

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[1] The first magistrate to consider the warrant request denied it, stating that while he understood that Petitioner had broadcast nude images over cable television, he was "not sure what the crime is" and that "I don't know if it's a criminal act. That's the problem I have." Denial of Search Warrant Before Magistrate Judge Fred D. Hartley, at 4-5 (Mich. Dist. Ct. April 28, 2000). The police then obtained a warrant from a different judge, based on a potential charge under the state's "open or indecent exposure" law. Search Warrant (Mich. Dist. Ct. issued April 28, 2000).

[2] The Circuit Court held as an initial matter that Petitioner was precluded by the "law of the case" doctrine from raising issues that had been

Petitioner subsequently appealed to the Michigan Court of Appeals, which affirmed his conviction in a written opinion issued May 10, 2005. Framing the question before it as "whether televising an image of a naked penis is an 'open or indecent exposure' under the language of the statute," the court answered in the affirmative. Pet. App. 5a. The court observed that previous cases defined "open exposure" as "'any conduct consisting of a display of any part of the human anatomy under circumstances which create a substantial risk that someone might be offended.'" *Id.* (quoting *People v. Vronko*, 579 N.W.2d 138, 142 (Mich. Ct. App. 1998) (internal quotation omitted)). The Court of Appeals stated: "Similarly here, we conclude that the purposes of the indecent exposure statute are best fulfilled by focusing on the impact that offensive conduct might have on persons subject to an exposure." Pet. App. 6a.

While conceding that "application of this statute or, indeed, any indecent exposure statute, to television or film images is unprecedented," the court stressed Petitioner's failure to identify any "authority holding that the language of this statute, or any similar statute, does not encompass televised images." Pet. App. 5a. According to the court, the "exposure" for which Petitioner was convicted occurred not when Petitioner made the film, but rather when Petitioner "arranged for the [film's] delivery to GRTV" for the purpose

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decided by the same court in Petitioner's earlier interlocutory appeal. The Circuit Court also addressed and disposed of Petitioner's constitutional claims on the merits, however. Before the Michigan Court of Appeals, the state conceded that the law of the case in the Circuit Court did not bar higher appellate courts from considering the merits of Petitioner's constitutional claims and reaching a different result. Plaintiff-Appellee's Brief in Opposition to Application for Leave to Appeal, Docket No. 252315, at 3 (Mich. Ct. App. filed Dec. 15, 2003). Thus, when the Court of Appeals granted leave to appeal, it addressed the merits of Petitioner's constitutional claims without reference to the law of the case in the Circuit Court.

of having it broadcast on cable television. Pet. App. 8a.[3] In the court's view, Petitioner "should have expected, or in fact did expect, that someone would observe the Dick Smart segment and be offended by it." Pet. App. 6a-7a. Although the court agreed that a televised image is "qualitatively different than a physical exposure," the court speculated that a televised image can be more "offensive and threatening" than nudity in a public square. Pet. App. 6a. Thus, the court saw "no reason to read into the statute a limitation that would prevent its application to [Petitioner's] televised and, therefore, powerfully effective exposure." Pet. App. 7a.

Turning to Petitioner's First Amendment claim, the court applied intermediate scrutiny under *United States v. O'Brien*, 391 U.S. 367 (1968), observing that this Court had twice applied *O'Brien* in what the Court of Appeals viewed as an indistinguishable context: nude dancing. Pet. App. 8a-9a (citing *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), and *City of Erie v. Pap's AM*, 529 U.S. 277 (2000)). The court thus approached the case as one involving the regulation of conduct – even though the offense for which Petitioner was convicted was the transmission of a cable television program. The court rejected Petitioner's argument that his conviction should be reviewed under the stringent scrutiny applied to restrictions on cable programming in *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000), and *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727 (1996). Positing that "a majority of the Supreme Court" has held that public nudity statutes are to be evaluated categorically under the *O'Brien* framework, the court concluded that *Playboy* and *Denver Area*, "which involve content-specific restrictions on speech itself, are simply

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[3] The court acknowledged that when Petitioner made the film, "no one allegedly observed the taping or took offense because of it." Pet. App. 8a.

inapposite to the question presented in this appeal." Pet. App. 14a. The court also relied on *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978), for the proposition that broadcasting has "the most limited First Amendment protection," and held that *Pacifica* applied with full force to cable programming such as Petitioner's. Pet. App. 14a.

"[D]iscern[ing] no difference between the Indiana public nudity statute in *Barnes* and the Michigan indecent exposure statute at issue here," the Court of Appeals concluded that the State's interest in protecting "morals and public order" was within the constitutional power of the state, furthered substantial government interests unrelated to restrictions on freedom of expression, and restricted Petitioner's speech no more than was necessary in order to further those government interests. Pet. App. 10a-13a. The court rejected Petitioner's argument, based on *Pap's*, that no "secondary effects" justified application of Michigan's indecent exposure statute to Petitioner's cablecast. The court concluded that the State need not show "secondary effects" to justify a restriction on Petitioner's expression, reasoning that "promotion of public morality through the prohibition of indecent exposure is a sufficient governmental interest to satisfy the second part of the *O'Brien* test." Pet. App. 13a.

Having determined that Petitioner's conviction did not offend the First Amendment, the court also rejected Petitioner's due process argument that the indecent exposure statute failed to give him fair warning that his conduct was proscribed. Pet. App. 15a-16a. The court relied on its earlier reasoning that televised images fall within the scope of the indecent exposure statute, explaining that the terms of the statute are not limited to circumstances where the "exposing person and the victims subject to the exposure are physically in the same place." Pet. App. 16a. Having found that the Petitioner "intended to maximize the impact of his open or

indecent exposure by using the cable medium," the court saw "no reason to conclude that he was not fairly on notice that a criminal charge or conviction could result." *Id.*

Petitioner subsequently appealed to the Michigan Supreme Court, which denied review on January 12, 2006. Pet. App. 1a. Two justices would have granted review. *Id.*

REASONS FOR GRANTING THE WRIT

"This case may seem at first blush too inconsequential to find its way into [the Court's] books, but the issue it presents is of no small significance." *Cohen v. California*, 403 U.S. 15, 15 (1971). That Petitioner's program might be offensive to some does not make it any less deserving of First Amendment protection, or his conviction less worthy of this Court's review. If anything, the need for review is greater here. Even if Petitioner's cable segment was of questionable taste, the constitutional values at stake in this case are paramount. "We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, [the] fundamental societal values [embodied in the First Amendment] are truly implicated." *Id.* at 25.

At bottom, the court below held that the creator of a cable program can be criminally punished under a public nudity law if a single viewer could find the transmission morally "offensive." That ultimate holding unquestionably clashes with our most basic First Amendment values. But while the result is clearly erroneous, the Michigan court's reasoning reflects confusion resulting from the intersection of multiple lines of this Court's precedents. Some of the steps in the state court's reasoning directly conflict with recent decisions of this Court. But other steps, although misguided, find at least superficial justification in some of this Court's cases. Thus, either summary reversal or plenary merits review under the First Amendment would be appropriate here. In

either event, however, this Court's intervention and guidance is urgently needed in light of the sweeping chilling effect of the criminal sanctions imposed in this case.

One important First Amendment question presented here arises from the Michigan Court of Appeals' unprecedented application of this Court's nude dancing decisions in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), and *City of Erie v. Pap's AM*, 529 U.S. 277 (2000), to the core First Amendment expression at issue in this case. Equating the visual *representation* of nudity in the cablecast here with the *physical* public nudity at issue in *Barnes* and *Pap's*, the state court held that Petitioner's cable program was conduct, not speech, and was therefore subject to review under the so-called *O'Brien* standard. The court also reasoned that *O'Brien* applies because Michigan's public nudity law is a content-neutral regulation on its face – even though here the law has been applied to criminalize pure speech merely because a single viewer found it "offensive." And in applying *O'Brien*, the Michigan court held that application of the law in this way could be justified on the ground that it maintains public "morality" by banning "offensive" depictions of nudity – despite the absence of "secondary effects." Under this chain of reasoning visual depictions of nudity are deprived of all First Amendment protection traditionally accorded by this Court, and instead may be criminalized solely because a viewer might be offended. Although that result is plainly wrong, it cannot be gainsaid that the lower court's reasoning finds some superficial foothold in the nude dancing decisions. Review by this Court is necessary to cabin those decisions and make clear that they cannot be transposed from physical nudity in public to visual representations of nudity like that involved here.

A second important First Amendment question presented is the proper level of scrutiny to be applied to allegedly

"indecent" or "offensive" cable programming. The Court has struggled with this question, at times likening televised cablecasts to broadcasts, and at other times noting important differences between the two media. Most recently, however, the Court unambiguously held that strict scrutiny applies to regulation of indecent cable programming. *United States v. Playboy Entm't Group*, 529 U.S. 803 (2000). But the Michigan Court of Appeals refused to follow *Playboy*, holding instead that cable is subject to the lower level of First Amendment protection applied to broadcast television in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), which upheld the FCC's authority to regulate the times during which indecent broadcasts could be aired in order to protect children. Further, the court below went far beyond *Pacifica* itself by upholding a *criminal* sanction for programming that was cablecast during the FCC's "safe-harbor" hours and was not shown to have been viewed by any child. The Michigan court's refusal to apply strict scrutiny reflects lingering uncertainty concerning the protection afforded cable programming in light of this Court's long struggle with the issue, and plenary review of this question would afford the Court an opportunity to provide much-needed additional guidance to the lower courts. In light of the direct conflict with *Playboy*, however, the needed guidance could also be provided by a per curiam opinion summarily reversing on this basis. In either event, the decision below cannot be allowed to stand.

The completely unprecedented nature of Petitioner's criminal prosecution means, of course, that there is no conflict among the lower courts in the precise circumstances here. But in light of the fundamental First Amendment values at stake, and the chilling effect of the sweeping reasoning in the decision below, immediate review by this Court is urgently needed. The standard of review applicable to laws that purport to criminalize cable programming is an

issue of broad importance. Even more critical is the criminalization of core First Amendment speech under the Court of Appeals' application of *O'Brien*. That reasoning would apply with equal force to every published visual depiction of nudity – *Schindler's List* being but one prominent example – whether on broadcast television, cable, movies, video, or even photographs. And since most or all jurisdictions have public nudity laws, this subversion of core First Amendment principles could have widespread application. Even in the absence of additional prosecutions, the decision below is certain to have a substantial chilling effect on protected expression containing depictions of nudity that some viewers could find offensive.

Alternatively, the Court should summarily reverse the decision below as directly contrary to the fair-warning requirement embodied in the Due Process Clause of the Fourteenth Amendment, which prohibits the States from imposing criminal sanctions for conduct that one could not reasonably understand to be proscribed. *E.g.*, *Bouie v. City of Columbia*, 378 U.S. 347, 350-51 (1964); *United States v. Lanier*, 520 U.S. 259, 270-71 (1997) (to give fair warning, criminal proscription must be "clearly established"). The Michigan Court of Appeals violated this principle by applying a novel construction of Michigan's indecent exposure statute to conduct that neither the statute nor any prior judicial decision fairly disclosed to be within the statute's scope. No court in the country had ever applied an indecent exposure statute to televised nudity, and the Michigan courts had always interpreted that state's indecent exposure law to apply only to exposures occurring in a public place. Furthermore, this Court has repeatedly struck down restrictions on indecent cable television programming. No reasonable person could have foreseen that televised nudity would be criminalized under Michigan's indecent exposure statute. Petitioner's conviction must be reversed.

I. This Case Presents Critical Questions Concerning The Government's Authority To Criminalize Images Of Nudity On Cable Television.

Michigan's unprecedented application of its "open or indecent exposure" law to cable television content raises a substantial question of First Amendment law: whether, by equating transmission of cable programming with physically appearing in a public square, a State can evade the scrutiny imposed by this Court's precedents on the regulation of indecent cable television content. If the Michigan court's reasoning were accepted, the careful balance this Court has struck in its media content cases would mean very little, and an entire category of expression – programs containing nudity – would be subject to criminal sanctions whenever someone finds them "offensive."

A. This Court Should Clarify That The *O'Brien* Rationale Cannot Be Applied To Representations Of Nudity That Are Merely "Offensive."

The Court has consistently held that the "indecent" or "offensive" nature of speech does not remove it from the protection of the First Amendment. "'Sexual expression which is indecent but not obscene is protected by the First Amendment.'" *Reno v. ACLU*, 521 U.S. 844, 874-75 (1997) (quoting *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989)); *see also Playboy*, 529 U.S. at 811-12 (sexually explicit cable programming "is protected speech"). Where obscenity is not involved, the fact that speech may be offensive to some does not justify its suppression. *Carey v. Population Servs., Int'l*, 431 U.S. 678, 701 (1977); *see also Cohen*, 403 U.S. at 22-23; *Pacifica*, 438 U.S. at 745.[4]

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[4] The State of Michigan has never contended that Petitioners' program was obscene and the State made no attempt to prosecute Petitioner pursuant to Michigan's obscenity statute, Mich. Comp. Laws § 752.365.

In this case, however, the Michigan Court of Appeals held that Petitioner could be criminally punished for an "offensive" cable transmission on the ground that Petitioner was convicted for "conduct" rather than speech. Pet. App. 6a-7a, 13a-14a. The Court of Appeals analyzed Petitioner's conviction under this Court's line of decisions governing situations where the enforcement of a rule unrelated to expression has the incidental effect of preventing a person from engaging in behavior which is not inherently expressive, but which the person may intend as expressive in specific contexts. *See O'Brien*, 391 U.S. 367 (general rule barring destruction of draft cards applied to burning of draft card as symbolic protest); *Barnes*, 501 U.S. 560 (general rule barring public nudity applied to dancing in the nude to enhance erotic message of dance); *Pap's*, 529 U.S. 277 (same).

The Michigan court's rationale that nudity in a cable program can somehow be separated from the "content" of that speech is fundamentally at odds with basic First Amendment principles. The court's approach, although erroneous, finds superficial justification in statements in *Barnes* and *Pap's* concerning the application of a generally applicable public nudity statute to nude dancing. This Court has struggled with how to characterize nude dancing for First Amendment purposes, and no position has garnered a clear majority. The Court should grant review to make clear that at the very least, *Barnes* and *Pap's* are limited to actual conduct in public, and cannot be extended to representations of nudity – whether on cable, on broadcast television, in films, or in photographs.

Petitioner was not convicted for the act of being nude or appearing nude in a public place. Neither private nudity nor the filming thereof is illegal under Mich. Comp. Laws § 750.335a (2000). Pet. App. 8a (noting that the "taping did

not constitute the 'exposure'" for which defendant was convicted; the criminal offense was causing the tape to be delivered for broadcast). Petitioner was convicted rather for causing his comedy skit to be shown on cable television. In other words, Petitioner was convicted for the content of his cable television program – an inherently expressive medium. His filming, producing, and acting in a non-obscene comedy skit that contained nudity would not have been illegal *but for* its having been shown on cable television.[5]

The Michigan Court of Appeals nevertheless concluded that Petitioner's conviction was subject to intermediate scrutiny under *O'Brien* because "defendant would have been properly subject to conviction for indecent exposure had he staged the Dick Smart segment in a traditional public square. He becomes entitled to no greater First Amendment protection, and cannot inoculate himself against criminal liability, by channeling his exposure through a cable television network." Pet. App. 14a.

The state court's mistaken leap of logic was fueled in part by the confusion stemming from this Court's nude dancing cases. The Michigan court relied on *Barnes* for the proposition that Petitioner was convicted for the act of being nude, not engaging in expression containing nudity. In *Barnes*, the plurality reasoned that "[p]ublic nudity is the evil the State seeks to prevent, whether or not it is combined with expressive activity." 501 U.S. at 571 (plurality); *see also Pap's*, 529 U.S. at 301 ("The ordinance regulates conduct, and any incidental impact on the expressive element of nude

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[5] Petitioner's conviction did not depend upon whether he exposed his own genitals; he would have been equally guilty of violating the statute if the nude images featured in his program had exposed "the person of another." Mich. Comp. Laws § 730.335a (2000). The jury was in fact instructed that it could also convict Petitioner if the cable program at issue exposed the genitals "of another." Trial Tr. at 145-46.

dancing is *de minimis*"). Following this rationale, the Michigan court held that "[s]imilarly, 'the 'perceived evil' that Michigan seeks to address through its indecent exposure statute is not the communication of some message associated with indecent exposure; it is the indecent exposure itself." Pet. App. 11a. The court also echoed the *Barnes* plurality's reasoning in declaring "Michigan's indecent exposure statute does not prevent the conveyance of any message. It merely requires that messages must be conveyed within minimal bounds of proscribed conduct having nothing to do with expression." *Id.*; *see Barnes*, 501 U.S. at 571 (plurality); *see also Pap's*, 529 U.S. at 301 (plurality).

The Court's nude dancing decisions cannot be expanded in this manner without undermining significant First Amendment principles. Under the Court of Appeals' approach, it would be possible to recast all filmed or photographed works as involving the "conduct" of the actors involved, and to treat the distribution of such works as making that conduct "public."[6] That cannot be the law. Indeed, such a conclusion is directly contrary to the Court's review of "indecent" cable programming as "involv[ing] speech alone." *Playboy*, 529 U.S. at 814. Nothing in *Barnes* or *Pap's* indicates that the Court would approve the application of public nudity statutes to television images – or magazines or movies or photographs, for that matter. To the contrary, in *Erznoznick v. City of Jacksonville*, 422 U.S. 205 (1975), the Court emphasized the constitutional distinction between public nudity and representations of nudity shown in public:

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[6] *Cf. Jenkins v. Georgia*, 418 U.S. 153, 156 n.2 & 161 (1972) (reversing movie theatre manager's conviction under obscenity statute; defendant had also been charged under statute making it a "crime to exhibit a motion picture portraying acts which would constitute 'public indecency' . . . if performed in a public place").

> Scenes of nudity in a movie, like pictures of nude persons in a book, must be considered as part of the whole work . . . . [i]n this respect such nudity is distinguishable from the kind of public nudity traditionally subject to indecent-exposure laws.

Id. at 211 n.7 (citations omitted); *see also Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 65-66 (1981) ("[A]n entertainment program [may not] be prohibited solely because it displays the nude human figure. '[N]udity alone' does not place otherwise protected material outside the mantle of the First Amendment.") (internal citations omitted); *Barnes*, 501 U.S. at 587 (Souter, J., concurring in the judgment) (noting that Indiana's public nudity statute did not prohibit the dancer or her employer "from expressing an erotic message by articulate speech or representational means").

As a matter of common sense, Petitioner's "Dick Smart" segment is speech, not conduct. However low-brow, the "Dick Smart" segment is no different from any other television show or film that expresses ideas through sight, sound and creativity. The Court has consistently held that the First Amendment applies with full force to this type of entertainment. The Michigan court departed from this well-settled law when it refused to apply meaningful scrutiny to Petitioner's conviction.

In addition to equating pure speech with conduct, the Court of Appeals bolstered its application of *O'Brien* by observing that Michigan's public indecency law is a content-neutral regulation. Pet. App. 13a-14a. The court held that, because the indecent exposure statute did not prohibit protected speech on its face, any application need only survive intermediate scrutiny as a content-neutral restriction. At least on their face, statements in the plurality opinions in *Barnes* and *Pap's* arguably support this proposition. *See,*

e.g., Pap's, 529 U.S. at 298 ("Erie's ordinance is on its face a content-neutral restriction that regulates conduct, not First Amendment expression"); *Barnes*, 501 U.S. at 566; *see also id.* at 572 (Scalia, J., concurring) ("On its face, this law is not directed at expression in particular").

Recently, however, members of this Court have emphasized that content-neutrality is "something of a fiction," and, accordingly, "content based" or "content neutral" statutory text are at best imprecise markers for the requisite level of scrutiny. *See, e.g., City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 444-45, 448 (2002) (Kennedy, J., concurring); *id.* at 455 (Souter, J., dissenting). This case presents in stark terms the issue of whether facial neutrality can insulate a law from stringent First Amendment scrutiny when it is applied to criminalize the core expressive content of speech. As interpreted by the Michigan Court of Appeals, the indecent exposure law outlaws any public exhibition of media that contains "offensive" nudity. That application would appear to be the paradigm of content-based censorship.

The Court of Appeals also cited *Barnes* for the proposition that the government's interest in protecting "morality" – without any showing of "secondary effects" – is sufficient justification for imposing criminal penalties on Petitioner. Pet. App. 11a-13a. But "protecting morality" by prohibiting speech that causes "offense" targets the *primary* effects of expression, and strict scrutiny therefore applies. *See Boos v. Barry*, 485 U.S. 312, 321 (1988) (plurality) ("The emotive impact of speech on its audience is not a 'secondary effect'"); *Playboy*, 529 U.S. at 811-12. In recent cases, moreover, this Court has indicated that targeting secondary effects – rather than the immorality or offensiveness of the speech itself – is a necessary prerequisite for application of intermediate scrutiny. *Alameda Books*, 535

U.S. at 449-50 (Kennedy, J., concurring) (to warrant intermediate scrutiny, "[t]he rationale of the ordinance *must* be that it will suppress secondary effects – and not by suppressing speech"); *see also Playboy*, 529 U.S. at 815 ("the lesser scrutiny afforded regulations targeting the secondary effects of crime or declining property values has no application to content-based regulations targeting the primary effects of protected speech"). To the extent that the plurality opinion in *Barnes* continues to provide a refuge for speech restrictions based on a moral code, the Court should make clear that the idea of promoting public morality by suppressing indecent *speech* is fundamentally at odds with the First Amendment.[7]

B. The Decision Below Perpetuates Confusion About The Level Of Scrutiny Applicable To Indecent Cable Programming.

This Court's cases indicate that cable programming should receive full First Amendment protection. The Court has applied searching constitutional review to government attempts to restrict "indecent" material on cable. *See Playboy*, 529 U.S. at 814; *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 756 (1996). In *Playboy*, the Court held that a statute requiring cable operators to scramble or time-restrict sexually oriented cable channels imposed a content-based burden on speech that triggered, and failed, strict scrutiny. 529 U.S. at 814. And in *Denver Area*, the Court struck down a requirement that cable operators restrict "patently offensive" material on leased channels because the statute did not "reveal the caution and care" of "laws that seek to reconcile the critically important

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[7] In recent years, moreover, the notion that preserving a moral code provides a legitimate governmental interest for restricting constitutional rights has been called into serious doubt. *See Lawrence v. Texas*, 539 U.S. 558, 571 (2003).

interest in protecting free speech with very important, or even compelling, interests that sometimes warrant restrictions." 518 U.S. at 756.

Rejecting the strict scrutiny applied in *Playboy*, the Michigan Court of Appeals instead cited *Pacifica* for the proposition that "broadcasting . . . has 'the most limited First Amendment protection,'" and concluded that the government's interest in protecting adults from offensive materials in their home justified Petitioner's conviction without any showing of compelling interest or narrow tailoring. Pet. App. 14a (quoting *Pacifica*, 438 U.S. at 748). The court held that *Pacifica* "applies to cable television broadcasting," citing as support the plurality opinion in *Denver Area*. *Id.*

The Michigan court's holding below reflects confusion in this Court's own cases concerning the extent to which the constitutional treatment afforded cable television differs or overlaps with that afforded the traditional broadcast medium. *Compare Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 637 (1994) ("the rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, whatever its validity in the cases elaborating it, does not apply in the context of cable regulation"), *with Denver Area*, 518 U.S. at 748 (plurality) (with respect to the effect of programming on children, "cable and broadcast television differ little, if at all"). Some statements suggest that the government's interest in protecting children from "indecent" or "offensive" programming may be the same for both types of media. *Denver Area*, 518 U.S. at 744 (plurality); *id.* at 771-72 (Stevens, J., concurring); *id.* at 776 (Souter, J., concurring); *id.* at 804 (Kennedy, J., concurring). But the Court's decisions also reflect a recognition that cable and traditional broadcast television differ in ways that may well result in less

tolerance for governmental restrictions in the cable medium than has been allowed in the area of broadcast.[8]

Most recently, in *Playboy*, a majority of the Court explicitly refused to apply the lower level of review employed in *Pacifica* to the cable medium. *Playboy*, 529 U.S. at 814. Indeed, while acknowledging that "[c]able television, like broadcast media, presents unique problems . . . which may justify restrictions that would be unacceptable in other contexts," *id.* at 813, the Court in *Playboy* emphatically stated that the standard for evaluating content-based restrictions on "indecent" cable programming is "clear: The standard is strict scrutiny." *Id.* at 814. Thus, the Michigan court's refusal to apply strict scrutiny directly conflicts with this Court's decision in *Playboy*.[9] And that error was clearly outcome determinative, as the application

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[8] One "key difference" between cable and broadcast television is that "[c]able systems have the capacity to block unwanted channels on a household-by-household basis," which "reduces the likelihood, so concerning to the court in *Pacifica* . . . that traditional First Amendment scrutiny would deprive the Government of all authority" to address the problem of minors' access to indecent material. *Playboy*, 529 U.S. at 815. The Court has also acknowledged the development of technologies that allow cable users to selectively block indecent material. *See Denver Area*, 518 U.S. at 756-57. As the Court made clear in *Playboy*, the government cannot ban indecent cable programming if the less restrictive measure of targeted blocking is a feasible and effective means of furthering the government's interests. *Playboy*, 529 U.S. at 815.

[9] The Michigan Court of Appeals' application of *Pacifica* to cable television also conflicts directly with several federal court decisions striking down restrictions on indecent cable television programming. *See, e.g., Cruz v. Ferre*, 755 F.2d 1415, 1420-21 (11th Cir. 1985) (*Pacifica* inapplicable to cable because it "does not 'intrude' into the home" in the way broadcast television does); *Community Television of Utah, Inc. v. Wilkinson*, 611 F. Supp. 1099, 1113-14 (D. Utah 1985) (same), *aff'd sub nom. Jones v. Wilkinson*, 800 F.2d 989 (10th Cir. 1986), *aff'd*, 480 U.S. 926 (1987); *Community Television of Utah, Inc. v. Roy City*, 555 F. Supp. 1164, 1168-70 (D. Utah 1982) (same).

of Michigan's indecent exposure statute to this cablecast plainly cannot survive strict scrutiny. Thus, even if plenary review by the Court of the First Amendment issues in this case were not appropriate, Petitioner's criminal conviction should be summarily reversed on this ground alone.

In any event, the Michigan Court of Appeal's holding goes far beyond what even *Pacifica* approved, and the Court's review is necessary to clarify that an interest in protecting adult viewers from "offense" is not a constitutionally permissible basis for imposing a total ban on "indecent" programming. Unlike the criminal ban here, *Pacifica* upheld the FCC's authority to regulate the time period during which broadcasters are permitted to air "indecent" material, based on the government's interest in protecting children. *See* 438 U.S. at 757 ("Commission sought to 'channel' the monologue to hours when the fewest unsupervised children would be exposed to it") (Powell, J., concurring in part and concurring in judgment). This Court has since repeatedly distinguished between the time regulation approved in *Pacifica* and a total ban on indecent material. *See Reno*, 521 U.S. at 867; *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 127 (1989).

Here, the Court of Appeals affirmed Petitioner's conviction despite the fact that his program was televised at 10:30 p.m. – within the "safe harbor" established by the FCC for broadcast – and without any evidence that children viewed or were at risk of viewing the program. Indeed, nothing in the Court of Appeals' decision turned on an interest in protecting minors from exposure to "indecent" material – the sole interest that this Court has held may justify restrictions on non-obscene material transmitted by broadcast or cable television or the Internet, provided the regulations do not unduly burden adult speech. *See Playboy*, 529 U.S. at 811; *Reno*, 521 U.S. at 875; *Denver Area*, 518

U.S. at 743; *Pacifica*, 428 U.S. at 749-50. To the contrary, Petitioner was convicted because another *adult* viewer was offended by what she saw. Pet. App. 4a; Trial Tr. at 23-25. And by its plain terms the Michigan court's decision applies to all nudity that any adult might find offensive, no matter the time of the day. Pet. App. 6a. Thus, even if *Pacifica* could properly be applied to cable television – a conclusion this Court has declined to adopt, *see Playboy*, 529 U.S. at 815 – it provides no support for the Michigan Court of Appeals' decision here.

C. Application Of State Public Nudity Statutes To Cable Programming Will Have Sweeping Effect.

Immediate review by this Court is urgently required in light of the sweeping chilling effect the decision below will have if not reversed. The interpretation employed by the Michigan Court of Appeals would apply to *any* depiction of nudity on cable that any viewer might deem "offensive." Indeed, the court's logic would extend to movies, magazines and other traditional media of protected speech. Given the boundless nature of the Michigan court's ruling, the consequences of the decision are troubling and far-reaching.

The chilling effect of the Michigan court's decision is undeniable. *See Reno*, 521 U.S. at 871-72 (expressing concern regarding the chilling effect of a criminal sanction on speech); *Ashcroft v. ACLU*, 542 U.S. 656, 660, 667 (2004). Preventing the appearance of nude images that might cause "offense" to cable television viewers is precisely the justification for Petitioner's conviction under the statute. And violation of the indecent exposure statute today can result in up to one year in prison or a fine of up to $1,000 or both. Mich. Comp. Laws § 750.335a (2006). Given the sweeping scope of the Michigan court's ruling, and the uncertainty about what kind of nude images would cause "offense," it is virtually certain that public access cable

programmers, and cable programmers in general, will be deterred from televising cable programs containing nudity. And because the rationale of the Michigan court, if left uncorrected, could be used by prosecutors in every state with a public nudity law to restrict nudity or indecency on cable television and other First Amendment media, the effects of Petitioner's conviction are potentially widespread.

The burden is not limited to the "Dick Smarts" of cable television. Under the Michigan court's rationale, the public indecency statute would conceivably extend to programming such as HBO's *The Sopranos*, or the televising of *Schindler's List*, *A Room With A View*, *The Talented Mr. Ripley*, or any other number of movies showing nudity on cable television or, indeed, through any other medium. It would prohibit the broadcast of Richard Strauss's "Dance of the Seven Veils" from the opera Salome, "everyone's favorite example of constitutionally protected striptease," *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1094 (7th Cir. 1990) (en banc) (Posner, J., concurring), *rev'd sub nom. Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), and would prohibit many graphic science programs. *See Denver Area*, 518 U.S. at 805 (Kennedy, J., concurring) ("Indecency often is inseparable from the ideas and viewpoints conveyed, or separable only with loss of truth or expressive power"). If allowed to stand, the Michigan court's rationale could be used to ban the display of a whole host of visual representations of nudity that some may find offensive.

Petitioner's conviction has important and long-lasting consequences for him personally, and for anyone else to whom the public indecency statute is applied for making programming containing nudity available to the public. This Court has repeatedly recognized the "opprobrium and stigma of a criminal conviction." *Reno*, 521 U.S. at 872; *see also In re Winship*, 397 U.S. 358, 363-64 (1970); *Lewis v. United*

States, 518 U.S. 322, 334 (1996) (Kennedy, J., concurring in judgment). "A custodial arrest exacts an obvious toll on an individual's liberty and privacy, even when the period of custody is relatively brief. . . . And once the period of custody is over, the fact of the arrest is a permanent part of the public record." *Atwater v. City of Lago Vista*, 532 U.S. 318, 364-65 (2001) (O'Connor, J., dissenting). Under certain circumstances, conviction under the State's indecent exposure statute could have even more severe consequences, including life imprisonment, *see* Mich. Comp. Laws § 750.335a(2)(c) (2006), and requiring registration as a sex offender under Mich. Comp. Laws § 28.722 *et seq*.

That the televising of an opera, a critically-acclaimed movie, or a bawdy stand-up comedy routine on cable television could result in the actor or even cable programmer spending a year or more in prison shatters the protections of the First Amendment.

II. Alternatively, The Court Should Summarily Reverse On Due Process Grounds Because The Law Did Not Give "Fair Warning" That It Could Be Applied In This Way.

Even apart from these First Amendment questions, Petitioner's conviction is inconsistent with this Court's "fair warning" precedents. If the Court does not accept full review of the case on the merits, it should at a minimum summarily reverse on the merits. But if the Court does engage in plenary review, it should grant the second question presented as well.

The Due Process Clause requires that a criminal statute give fair warning of the conduct it criminalizes so that "no man [is] held criminally responsible for conduct which he could not reasonably understand to be proscribed." *Bouie*, 378 U.S. at 351. This fair warning principle not only prohibits the enforcement of a criminal statute "so vague that

men of common intelligence must necessarily guess at its meaning and differ as to its application," but also "bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *United States v. Lanier*, 520 U.S. 259, 266 (1997) (quotation marks omitted). The "touchstone" of fair warning is "whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *Id.* at 267. As this Court has repeatedly made clear, the standard for determining whether a criminal law provides fair warning is "the same as the standard for determining whether a constitutional right was 'clearly established' in civil litigation under [42 U.S.C.] § 1983." *Hope v. Pelzer*, 536 U.S. 730, 740 (2002) (citing *Lanier*, 520 U.S. at 270-71).

The Michigan Court of Appeals clearly violated the fair warning requirement by applying to Petitioner an unprecedented and unforeseeable construction of Michigan's indecent exposure statute. As the court acknowledged, the "application of [the Michigan indecent exposure] statute or, indeed, any indecent exposure statute, to television or film images is *unprecedented*." Pet. App. 5a (emphasis added). Nationally, past convictions for indecent exposure appear to be limited to physical exposures. *See* David Minneman, *What Constitutes "Public Place" Within Meaning of State Statute or Local Ordinance Prohibiting Indecency or Commission of Sexual Act in Public Place*, 95 A.L.R.5th 229 (2002) (listing various locations in which indecent exposures have been held to occur).[10] The utter lack of any precedent

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[10] The lack of any prior case applying an indecent exposure statute to a televised image distinguishes this case from *Rose v. Locke*, 423 U.S. 48 (1975), where the Court held that Tennessee's "crime against nature" statute gave fair warning that it applied to cunnilingus, because "[o]ther jurisdictions had already reasonably construed identical statutory

even suggesting that a public indecency statute could be applied to televised nudity made it far from "clearly established" that Petitioner's conduct was criminal.

The Court of Appeal's application of the indecent exposure statute to cable programming was not only unprecedented, but also unforeseeable, in light of prior Michigan court rulings limiting the statute's scope to conduct occurring in a public place. In *People v. Vronko*, 579 N.W.2d 138 (Mich. Ct. App. 1998), the court upheld the defendant's indecent exposure conviction for revealing his genitalia and masturbating while seated in a parked car on a public street. In reaching this result, the court interpreted the statute to apply "in a public place," either in the actual presence of another person or "under circumstances in which another person might reasonably be expected to observe [the exposure]." *Id.* at 142. The court noted that at common law, an indecent exposure had to occur "in a public place," and that "nothing in the language of the statute suggests that the Legislature intended to modify the common-law interpretation." *Id.* Earlier Michigan cases applied the statute only when the exposure occurred in a public place. *See People v. Wilson*, 291 N.W.2d 73 (Mich. Ct. App. 1980) (defendant masturbated on stage in front of a live audience); *People v De Vine*, 261 N.W. 101, 102 (Mich. 1935) (defendant exposed himself on his front porch, which was frequented by children of neighboring families); *People v. Ring*, 255 N.W. 373, 374-75 (Mich. 1934) (defendant exposed himself in a nudist colony); *People v. Katz*, 203 N.W. 114, 115 (Mich. 1925) (defendant exposed himself in a vacant lot while calling to children across the street).

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language to apply to [cunnilingus]." *Id.* at 53; *see also id.* at 50 ("Anyone who cared to do so could certainly determine what particular acts have been considered crimes against nature, and there can be no contention that the respondent's acts were ones never before considered as such").

Under *Vronko* and its predecessors, it was far from clearly established that televised nudity could be punished under Michigan's public indecency statute. Petitioner thus could not have foreseen that he could he held criminally liable for arranging for his program to be sent to GRTV for broadcast on cable television. The record is devoid of any evidence even suggesting that Petitioner was in a public place when he arranged to send the film to GRTV, and the broadcast itself cannot plausibly qualify as a "place," much less a "public place," under *Vronko*.[11] The Court of Appeals greatly enlarged the scope of the statute by applying it not only to physical locations but also to televised images. "Petitioner's conviction was thus affirmed under a statute with a meaning quite different from the one he was charged with violating." *Rabe v. Washington*, 405 U.S. 313, 315 (1972) (per curiam).[12]

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[11] *See* The Compact Oxford English Dictionary 1353 at 937-38 (2d ed. 1991) (defining "place" as an "[o]pen space in a city; a square; a market place;" "[a] material space;" "[a] particular part of space, of defined or undefined extent, but of definite situation;" "[t]he portion of space actually occupied by a person or thing;" "a piece or plot of land;" "[a] portion of space in which people dwell together;" "[a] residence, dwelling, house; a seat, mansion, palace;" or "[a] building, apartment or spot devoted to a specified purpose").

[12] Thus, the Court of Appeals' decision "upset" the earlier, narrower construction of the statute in *Vronko*. *See Marks v. United States*, 430 U.S. 188, 195 (1977) (broad reading of obscenity statute was unforeseeable because it upset a previously established narrower construction); *see also Douglas v. Buder*, 412 U.S. 430, 432 (1973) (per curiam) (interpretation of "arrest" to include a traffic citation was unforeseeable because it conflicted with the narrower definition of "arrest" in the parole revocation statute); *Bouie*, 378 U.S. at 350 (reversing criminal trespass convictions because state court's construction of criminal trespass statute was unforeseeable in light of the narrow statutory text).

Further, Petitioner's broadcast took place against a backdrop of decisions from this Court applying searching scrutiny to restrictions on "indecent" expression on cable and the Internet. *See Denver Area*, 518 U.S. at 756; *Reno*, 521 U.S. at 867; *see also Playboy*, 529 U.S. at 814. Nothing in this Court's decisions would have led Petitioner to believe that he could be prosecuted and convicted under a public conduct statute for arranging for the cablecast of his program. To the contrary, if anything, Petitioner would have reasonably believed that well-established First Amendment principles protected cable programs containing controversial or even offensive speech, provided it was not obscene.

The violation of fair warning in this case is materially indistinguishable from the one at issue in *Rabe v. Washington*, 405 U.S. 313 (1972) (per curiam). There, the petitioner had been convicted of violating a Washington obscenity statute prohibiting the knowing display of obscene motion pictures. In affirming the conviction, the Washington Supreme Court held that even though the film at issue was not itself obscene and thus could lawfully be displayed at an indoor theatre, it was obscene when shown at a drive-in theatre. This Court overturned the conviction because the Washington Supreme Court's broadening of the statute was unexpected: it did not give the petitioner fair notice that criminal liability was dependent upon the place where the film was shown. *Id.* at 315-16 (relying on *Cohen v. California*, 403 U.S. 15, 19 (1971), in which the Court held that California's statute prohibiting disturbances of the peace did not provide the petitioner fair notice that certain kinds of otherwise permissible speech were impermissible when uttered in a courthouse). This case is no different. The Michigan Court of Appeals' broadening of the statute to include televised images was similarly unexpected. Petitioner had no way to anticipate that a statute prohibiting exposures in a public place would be extended to his cable

television program. Just as in *Rabe*, summary reversal is warranted to correct the state court's grave violation of due process.

In short, by no stretch of the imagination did either the public indecency statute itself, or court decisions interpreting it, clearly establish that the statute proscribes offensive nudity in a cable program. Petitioner's conviction patently violates the fair warning requirement under this Court's cases. And the Court has not hesitated to summarily reverse state court criminal convictions in analogous situations. *See Lanier v. South Carolina*, 474 U.S. 25 (1985) (per curiam) (summarily reversing conviction as contrary to Supreme Court's Fourth Amendment search and seizure jurisprudence); *Payne v. Virginia*, 468 U.S. 1062 (1984) (per curiam) (summarily reversing conviction as contrary to Supreme Court's Double Jeopardy Clause jurisprudence); *Rabe*, 405 U.S. at 316 (summarily reversing state court obscenity conviction as contrary to Supreme Court's fair warning jurisprudence); *see also Douglas*, 412 U.S. at 432 (summarily reversing state court's revocation of parole as contrary to Supreme Court's fair warning jurisprudence).[13] Summary reversal is particularly warranted here in light of the important First Amendment interests at stake. *See Marks*, 430 U.S. at 196 ("We have taken special care to insist on fair warning when a statute regulates expression and implicates First Amendment values"); *Rose*, 423 U.S. at 50 n.3 (fair warning case noting that "special judicial scrutiny" is called for when "the statute threatens a fundamental right such as freedom of speech").

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[13] *See also* Robert L. Stern, *et al.*, *Supreme Court Practice* 323 (8th ed. 2002) (the Supreme Court "has shown no reluctance to reverse summarily a state court decision found to be clearly erroneous").

CONCLUSION

The petition for a writ of certiorari should be granted and the case set down for plenary hearing on the merits or, alternatively, the conviction should be summarily reversed.

Respectfully submitted,

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May 12, 2006

Appendix A

Supreme Court of Michigan

Jan. 12, 2006
129042 & (92)(83)(84)

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,
v.
TIMOTHY BRUCE HUFFMAN,
Defendant-Appellant.
_____/

SC: 129042
COA 252315
Kent CC: 03-002313-AR
61st DC: 2000-SM-1326

On order of the Court, the motions to admit James N. Horwood, Peter J. Hopkins, Tillman L. Lay and Eugene Volokh pro hac vice are GRANTED. The motion for leave to file a brief amicus curiae is GRANTED. The application for leave to appeal the May 10, 2005 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

CAVANAGH and KELLY, JJ., would grant leave to appeal.

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

January 12, 2006

/s/
Clerk

Appendix B

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	FOR PUBLICATION May 10, 2005 9:05 a.m.
v. Timothy Bruce HUFFMAN, Defendant-Appellant.	No. 252315 Kent Circuit Court LC No. 03-002313-AR Official Reported Version

Before: Schuette, P.J., and Fitzgerald and Bandstra, JJ.

BANDSTRA, J.

Defendant produced and arranged for the cable transmission of a television show featuring exposed genitalia. In this appeal, he seeks to have his conviction under Michigan's open or indecent exposure statute overturned primarily because of his arguments that the statute does not apply to television programming and that, if it does, he cannot be convicted under First Amendment principles. We conclude, both because the statute includes no limitation that would prevent its application to television exposures and because such exposures can be more offensive than a more traditional public exposure, that the statute was properly applied against defendant. Further, employing the four-part test required by the United States Supreme Court in *United States v. O'Brien*, 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968), and its progeny, we conclude that defendant's conviction under the statute did not violate the First Amendment.

I. Basic Facts and Proceedings Below

Defendant regularly produces television programs that are distributed on the Grand Rapids public-access cable channel, GRTV. At issue here is the sixty-eighth episode of the show he has entitled "Tim's Area of Control." After defendant submitted a videotape of that episode to GRTV, it was shown on March 31, 2000, and April 7, 2000, both times between 10:30 and 11:00 p.m., without any prescreening. The episode included a three-minute segment in which a flaccid penis and testicles marked with facial features were the only objects within camera range. During this segment, a voice-over was heard identifying the penis character as "Dick Smart" and providing purportedly humorous commentary as if on behalf of the character.[1] Only Smart was shown on the videotape; the

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1 The transcript of the segment is as follows:

Hey, how ya doing, ya, ya, ya. Hi, I'm Dick Smart I am a comedian, yeah, stand up, ha. Yeah, yeah, look over there, look over there it awe [sic] there is a whole table of dick heads over there, I can't believe it yeah, what a crowd, what a crowd. Oh I love it when it's exciting like this, ya know what I mean.

Hey listen I got a joke for you, 2 guys they go into a bar, yeah, yeah, yeah, whats [sic] the matter with you lady, you never seen a dick before? One guy says to the other guy, hey I gotta go to the head, order me a draft beer and a tuna fish sandwich would ya and he says yeah. Okay so the guy kinda goes into the bar, ya and the bartender says, "what do ya need" he says I need 2 draft beers and a tuna fish sandwich. What what ya heard this one before or what, shut up then okay. So he says okay he says I'll bring your drink to you, the guy goes down to the bar, turns around half-way down the bar and goes hey, he goes are you gay? The guy says what, no, I'm just in a god [sic] mood, ha, ha ha, awe [sic] you heard that one before, I can't believe it, don't you people laugh or what, are ya all getting enemas?

What's the deal with you over there you never seen a funny dick before or what (laughter). Yeah, I was in the grocery store the other day a guy comes up and he says "hey, you're a dick" I says yeah so are you, ha, ha. I can't believe it, yeah, yeah, yeah, yeah, yeah, I was in the army ya know, yeah, yeah, I didn't do much, ya know what I mean? I just hung around (laughter). Yeah, yeah, so I was walking down the sidewalk the other day

rest of the body that would otherwise be visible was shrouded with a cloth.

The GRTV public-access channel is available to approximately 46,000 cable subscribers in the Grand Rapids community. One of those subscribers who was watching on April 7, 2000, lodged a complaint with GRTV and, following an investigation, a search warrant was executed and the police seized a copy of a videotape containing the Dick Smart segment at defendant's home. Defendant was arrested and charged with a violation of M.C.L. § 750.335a, Michigan's "open or indecent exposure" statute. He was convicted in district court and sentenced to one day in jail, with credit for time served, and twelve months of probation. He was also fined $500 and ordered to pay costs totaling an additional $525. Defendant appealed his conviction to the circuit court, which affirmed. We granted defendant's application for leave to appeal.

II. Does the "Open or Indecent Exposure" Statute Apply to Television Images?

Defendant first argues that his conviction must be reversed because M.C.L. § 750.335a cannot be properly construed to apply to televised images. Construction of a statute is a question of law that we review de novo. *People v. Spanke*, 254 Mich. App. 642, 645, 658 N.W.2d 504 (2003).

The statute under which defendant was charged and

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and ya know I was just looking around and I don't know about you, but when I see a good looking woman and it's kind of balmy out and I kinda change I'm like a Doctor Jekyll and Mr. Hyde kinda guy (laughter). Ya know what I mean some people, I had a woman tell me the other day she thought I looked like Hulk Hogan (laughter) I said yeah, you crazy stupid bitch, Hulk Hogan, hell, he's rich, yeah I'm just some dick head I just ya know I make people laugh, I get a couple of bucks ya know what I mean everyone's gotta eat, ya know what I'm sayin. Well ah a little two step I learned when I was in the Nam-yeah.

convicted provided, in relevant part, "Any person who shall knowingly make any open or indecent exposure of his or her person or of the person of another shall be guilty of a misdemeanor...." M.C.L. § 750.335a.

Defendant does not argue that he did not act "knowingly" in producing and submitting the Dick Smart tape for cable distribution, nor does it matter under the statute whether the character was portrayed by defendant's penis or that of another person. At issue here is whether televising an image of a naked penis is an "open or indecent exposure" under the language of the statute. Defendant argues that "[t]he application of this statute or, indeed, any indecent exposure statute, to television or film images is unprecedented." While that may well be the case, defendant points to no authority holding that the language of this statute, or any similar statute, does not encompass televised images.

While not factually similar, *People v. Vronko,* 228 Mich. App. 649, 579 N.W.2d 138 (1998), provides us guidance on this question. A panel of our Court construed M.C.L. § 750.335a in a manner "consistent with our interpretation of the statutes proscribing 'gross indecency,'" M.C.L. §§ 750.338 through 750.338b. *Vronko, supra* at 656, 579 N.W.2d 138. The panel noted that "[t]he gross indecency statutes seek to protect the public from the possibility of being exposed to certain acts of sexual conduct. Such conduct is grossly indecent 'when an unsuspecting member of the public, who is in a place the public is generally invited or allowed to be, could have been exposed to or viewed the act.'" *Id.* (citation omitted). Further, the panel noted that "open exposure" under M.C.L. § 750.335a has been defined as "'any conduct consisting of a display of any part of the human anatomy under circumstances which create a substantial risk that someone might be offended.'" *Id.*, quoting *In re Certified Question (Jewell Theatre Corp. v. Oakland Co. Prosecutor),* 420 Mich. 51, 63, 359 N.W.2d 513 (1984) (Boyle,

J., concurring). The *Vronko* panel adopted Justice Boyle's reasoning that "'[t]his standard would require evaluation of the setting in which the exposure took place in order to determine whether anyone might reasonably have been expected to observe it and, if so, whether the person might reasonably have been expected to have been offended by what was seen.'" *Vronko, supra* at 656-57, 579 N.W.2d 138, quoting *In re Certified Question, supra* at 63, 359 N.W.2d 513 (Boyle, J., concurring).

Similarly here, we conclude that the purposes of the indecent exposure statute are best fulfilled by focusing on the impact that offensive conduct might have on persons subject to an exposure. Defendant admits that, had he staged the Dick Smart production in a traditional "public square," like Grand Rapids' downtown Calder Plaza, the statute would apply. Nonetheless, he argues that such a live, in-person exhibition presents a greater threat and offense to observers than a televised exhibition, where the exposed person is not physically present.

While we agree that a televised exposure is qualitatively different than a physical exposure, we note that, in some ways, it can be more offensive and threatening. While a person might minimally suspect that some stranger might expose himself in a public forum, to be subjected to a televised exposure in the privacy of a home is likely a more shocking event. Further, defendant's exposure, while televised, was presumably more of an immediate closeup than would occur if he had been physically present with those subject to his exposure. The Dick Smart character portrayed on TV screens was probably larger than actual size and the exposure continued for fully three minutes, much longer than would have likely been allowed on Calder Plaza or in some other public square.

There is no doubt that defendant should have expected, or in

fact did expect, that someone would observe the Dick Smart segment and be offended by it. *Vronko, supra* at 656-657, 579 N.W.2d 138. Like the courts below, we see no reason to read into the statute a limitation that would prevent its application to defendant's televised and, therefore, powerfully effective exposure. We hold that the statute was properly applied to encompass an "open or indecent exposure" in the form of a televised image.

This conclusion regarding M.C.L. § 750.335a is not disturbed by defendant's argument that another statute, M.C.L. § 750.38, also covers images of nudity.[2] While a criminal charge might have been brought under M.C.L. § 750.38, the prosecutor had discretion to bring a charge under M.C.L. § 750.335a instead. *People v. Ford,* 417 Mich. 66, 92, 331 N.W.2d 878 (1982). For the reasons stated, defendant's conduct fell within the purview of M.C.L. § 750.335a and the charge brought against him under that statute was appropriate.

III. Did Sufficient Evidence of Venue Exist?

Defendant further contends that the trial court erred by denying his motion for a directed verdict because there was insufficient evidence showing that the indecent exposure occurred within the venue of the district court, the city of Grand Rapids. We review the record de novo to determine whether a rational trier of fact could have determined that this element of the crime was proven beyond a reasonable doubt. *People v. Aldrich,* 246 Mich. App. 101, 122, 631 N.W.2d 67 (2001).

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2 M.C.L. § 750.38 provides, in relevant part:

> Any person who shall post, place or display on any sign board, bill board, fence, building, sidewalk, or other object, or in any street, road, or other public place ... any representation of the human form in an attitude or dress which would be indecent in the case of a living person, if such person so appeared in any public street, square or highway, shall be guilty of a misdemeanor.

Defendant's argument concentrates on the lack of evidence regarding the place where the Dick Smart film was taped. However, that taping did not constitute the "exposure" for which defendant was charged under the statute; no one allegedly observed the taping or took offense because of it. Instead, the exposure offense occurred when defendant arranged for the tape's delivery to GRTV, in Grand Rapids, for the purpose of having it distributed by cable network into thousands of homes, many of which are located in Grand Rapids. We reject defendant's argument in this regard.

IV. Does the Conviction Violate Defendant's First Amendment Right to Free Speech?

Defendant argues that his First Amendment right to free speech was violated by his conviction under the indecent exposure statute. Questions regarding the constitutionality of statutes are matters of law that we review de novo. *People v. Jensen (On Remand)*, 231 Mich. App. 439, 444, 586 N.W.2d 748 (1998).

This issue is governed by a case concerning draft card burning, *O'Brien*, and two cases applying *O'Brien* in a context similar to this case, i.e., nude dancing, *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1991), and *City of Erie v. Pap's AM*, 529 U.S. 277, 120 S. Ct. 1382, 146 L. Ed. 2d 265 (2000). In *O'Brien*, the Supreme Court analyzed the act of burning a draft card as one involving "'speech' and 'nonspeech' elements ... combined in the same course of conduct...." *O'Brien, supra* at 376, 88 S. Ct. 1673. The Court held that "a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms" applicable to the speech elements. *Id.* The *O'Brien* Court announced a four-part test for determining whether a governmental regulation is sufficiently justified in this context:

a court must examine "if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 377, 88 S. Ct. 1673.

The four-part *O'Brien* test was used by a plurality of justices in *Barnes.*[3] The *Barnes* defendants had been convicted under an Indiana statute providing, in pertinent part, that "'[a] person who knowingly or intentionally, in a public place . . . appears in a state of nudity . . . commits public indecency, a Class A misdemeanor.'" *Barnes, supra* at 569 n. 2, 111 S. Ct. 2456 (opinion of Rehnquist, C.J.), quoting a former version of Ind. Code 35-45-4-1(a). The defendants were businesses that staged adult entertainment for their patrons, along with nude female dancers they employed.

With respect to the first two parts of the *O'Brien* analysis, the *Barnes* plurality held that "[t]he public indecency statute is clearly within the constitutional power of the State and furthers substantial governmental interests." *Id.* at 567, 111 S. Ct. 2456. The justices noted that "the statute's purpose of protecting societal order and morality is clear" and that

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3 A fourth justice "agree[d] with the plurality that the appropriate analysis to determine the actual protection required by the First Amendment is the four-part enquiry described in [*O'Brien*]," but applied that analysis differently. *Id.* at 582, 111 S. Ct. 2456 (Souter, J., concurring). In addition, Justice Scalia concurred in the judgment of the plurality, reasoning that the First Amendment was simply inapplicable to the public nudity statute. *Id.* at 572, 111 S. Ct. 2456 (Scalia, J. concurring) ("[T]he challenged regulation ... as a general law regulating conduct and not specifically directed at expression ... is not subject to First Amendment scrutiny at all."). While we review defendant's conviction under the *Barnes* plurality's approach, we note that it would also be upheld under the analysis employed by Justice Scalia.

"[p]ublic indecency statutes of this sort are of ancient origin and presently exist in at least 47 States." *Id.* at 568, 111 S. Ct. 2456. Further, "[p]ublic indecency statutes such as the one before us reflect moral disapproval of people appearing in the nude among strangers in public places." *Id.* "This and other public indecency statutes were designed to protect morals and public order. The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals, and we have upheld such a basis for legislation." *Id.* at 569, 111 S. Ct. 2456.

With respect to the first two parts of the *O'Brien* test, we discern no difference between the Indiana public nudity statute in *Barnes* and the Michigan indecent exposure statute at issue here. Adopting the analysis of the Supreme Court as equally applicable here, we conclude that Michigan's indecent exposure statute is clearly within the constitutional power of the state and that it furthers substantial governmental interests.

With respect to the third part of the *O'Brien* test, the *Barnes* plurality held that the governmental interest in protecting morals and public order through the prohibition of public nudity "is unrelated to the suppression of free expression." *Id.* at 570, 111 S. Ct. 2456.

> Respondents contend that even though prohibiting nudity in public generally may not be related to suppressing expression, prohibiting the performance of nude dancing is related to expression because the State seeks to prevent its erotic message . . .
>
> But we do not think that when Indiana applies its statute to the nude dancing in these nightclubs it is proscribing nudity because of the erotic message conveyed by the dancers. Presumably numerous other erotic performances are presented at these establishments and similar clubs without any

> interference from the State, so long as the performers wear a scant amount of clothing. Likewise, the requirement that the dancers don pasties and G-strings does not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic. The perceived evil that Indiana seeks to address is not erotic dancing, but public nudity. The appearance of people of all shapes, sizes and ages in the nude at a beach, for example, would convey little if any erotic message, yet the State still seeks to prevent it. Public nudity is the evil the State seeks to prevent, whether or not it is combined with expressive activity. [*Id.* at 570-571, 111 S. Ct. 2456.]

Similarly, the "perceived evil" that Michigan seeks to address through its indecent exposure statute is not the communication of some message associated with indecent exposure; it is the indecent exposure itself. In other words, defendant's Dick Smart segment is not proscribed because of any message it conveys; similar conduct by others having no message whatsoever would be similarly proscribed. Further, the requirement of some minimal clothing does not deprive Dick Smart of his message; it simply makes that message slightly less graphic. Thus, Michigan's indecent exposure statute does not prevent the conveyance of any message. It merely requires that messages must be conveyed within minimal bounds of proscribed conduct having nothing to do with expression.

Finally, the *Barnes* plurality considered the fourth part of the *O'Brien* test:

> The fourth part of the *O'Brien* test requires that the incidental restriction on First Amendment freedom be no greater than is essential to the furtherance of the governmental interest. As indicated in the discussion

> above, the governmental interest served by the text of the prohibition is societal disapproval of nudity in public places and among strangers. The statutory prohibition is not a means to some greater end, but an end in itself. It is without cavil that the public indecency statute is "narrowly tailored"; Indiana's requirement that the dancers wear at least pasties and G-strings is modest, and the bare minimum necessary to achieve the State's purpose. [*Id.* at 571-72, 111 S. Ct. 2456.]

Again, we find this analysis applicable to the Michigan indecent exposure statute, and conclude that the incidental restriction on defendant's First Amendment freedom is no greater than is essential to the furtherance of the governmental interest in promoting public morality by prohibiting public nudity.

In a more recent opinion, a plurality of justices of the Supreme Court[4] again employed the *O'Brien* test to conclude that a city ordinance prohibiting appearing in public in a "state of nudity" did not violate First Amendment rights in application to nude dancing. *Erie, supra* at 296-302, 120 S. Ct. 1382 (opinion of O'Connor, J.). With respect to the second part of the *O'Brien* test, whether the public nudity ordinance furthered an important governmental interest, the plurality concentrated on "harmful secondary effects associated with nude dancing...." *Id.* at 296, 120 S. Ct. 1382. The preamble to the ordinance stated that its purpose, in part, was to prevent "'"an atmosphere

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4 The plurality in *Erie* consisted of four justices. *Erie, supra* at 282, 120 S. Ct. 1382 (opinion of O'Connor, J.). In addition, Justice Scalia was joined by Justice Thomas in the view, set out earlier in his concurring opinion in *Barnes*, that, because the ordinance prohibited the act of going nude in public, irrespective of any expressive purposes, "'it is not subject to First Amendment scrutiny at all.'" *Id.* at 307-08, 120 S. Ct. 1382 (Scalia, J., concurring), quoting *Barnes, supra* at 572, 111 S. Ct. 2456 (Scalia, J., concurring).

conducive to violence, sexual harassment, public intoxication, prostitution, and the spread of sexually transmitted diseases and other deleterious effects"'" in association with nude dancing. *Id.* at 290, 120 S. Ct. 1382 (citations omitted). Defendant here argues that such "harmful secondary effects" are necessary to justify Michigan's public indecency statute, but we do not conclude that *Erie* stands for this proposition. The prevention of such secondary effects is certainly sufficient to satisfy the second part of the *O'Brien* test, but nothing in *Erie* suggests that it is necessary. No such secondary effects were considered in *Barnes;* the plurality found sufficient governmental interest merely on the basis that preventing public nudity promotes public morality. *Barnes, supra* at 568-569, 111 S. Ct. 2456 (opinion of Rehnquist, C.J.). *Erie* did not disavow that approach, and we conclude that the promotion of public morality through the prohibition of indecent exposure is a sufficient governmental interest to satisfy the second part of the *O'Brien* test. "The traditional power of government to foster good morals (*bonos mores*), and the acceptability of the traditional judgment ... that nude public dancing *itself* is immoral, have not been repealed by the First Amendment." *Erie, supra* at 310, 120 S. Ct. 1382 (Scalia, J., concurring) (emphasis in original). The same analysis applies in this indecent exposure case.

Defendant seeks to avoid the analysis of *O'Brien; Barnes*, and *Erie* by arguing that we should examine precedents involving regulations of cable television programmers, citing especially *Denver Area Ed. Telecom. Consortium, Inc. v. Fed. Communications Comm.*, 518 U.S. 727, 116 S. Ct. 2374, 135 L.Ed.2d 888 (1996), and *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000). However, as the plurality opinion in *Erie* expressly stated, "We now clarify that government restrictions on public nudity such as the ordinance at issue here should be

evaluated under the framework set forth in *O'Brien* for content-neutral restrictions on symbolic speech." *Erie, supra* at 289, 120 S. Ct. 1382 (opinion of O'Connor, J.). In his separate opinion, Justice Souter specifically agreed with that conclusion. *Id.* at 310, 120 S. Ct. 1382 (Souter, J., concurring in part and dissenting in part). Thus, a majority of the Supreme Court held that cases like that before us now, involving content-neutral restrictions on expressive conduct that constitutes symbolic speech, must be tested under the *O'Brien* analysis. Cases like *Denver* and *Playboy,* which involve content-specific restrictions on speech itself, are simply inapposite to the question presented in this appeal.

Further, the United States Supreme Court has noted that, of all forms of communication, it is broadcasting that has "the most limited First Amendment protection." *Fed. Communications Comm. v. Pacifica Foundation,* 438 U.S. 726, 748, 98 S. Ct. 3026, 57 L. Ed. 2d 1073 (1978). The Court so reasoned, in part, because "the broadcast media have established a uniquely pervasive presence in the lives of all Americans," meaning that "[p]atently offensive, indecent material ... confronts the citizen, not only in public, but also in the privacy of the home," generally without sufficient prior warning to allow the recipient to avoid it. *Id.* This same reasoning applies to cable television broadcasting. *Denver, supra* at 744, 116 S. Ct. 2374 (opinion of Breyer, J.). Under *O'Brien* and its progeny, defendant would have been properly subject to conviction for indecent exposure had he staged the Dick Smart segment in a traditional public square. He becomes entitled to no greater First Amendment protection, and cannot inoculate himself against criminal liability, by channeling his exposure through a cable television network.

V. Is M.C.L. § 750.335a Unconstitutionally Vague and Overbroad?

Defendant contends that the statute is unconstitutionally vague and overbroad. Questions regarding the constitutionality of statutes are matters of law that we review de novo. *Jensen, supra* at 444, 586 N.W.2d 748.

In *Vronko,* a panel of our Court considered whether the language "open or indecent exposure" in M.C.L. § 750.335a was unconstitutionally vague and determined that it was not. The panel noted that "[a] statute is not vague if the meaning of the words in controversy can be fairly ascertained by reference to judicial determinations, the common law, dictionaries, treatises, or their generally accepted meaning." *Vronko, supra* at 653, 579 N.W.2d 138. The panel noted that the Michigan Supreme Court has reasoned that the "'well settled and generally known significance of the phrase "indecent and obscene exposure of the person" is the exhibition of those private parts of the person which instinctive modesty, human decency or natural self-respect requires shall be customarily kept covered in the presence of others.'" *Id.*, quoting *People v. Kratz,* 230 Mich. 334, 337, 203 N.W. 114 (1925). The panel further reasoned that, under common dictionary definitions of the words contained in M.C.L. § 750.335a, the defendant was fairly placed on notice that his intentional exposure of his genitals in a place where such exposure was likely to be an offense against generally accepted standards of decency constituted "indecent exposure." *Id.* at 654, 579 N.W.2d 138.

To the extent that defendant here argues that he was not fairly on notice that the conduct leading to his conviction was "open or indecent exposure," we agree with *Vronko* and reject that argument. Further, the trier of fact in this case was instructed on the meaning of "open or indecent exposure" as those terms have been described and defined in judicial

precedents; it was not left with "unstructured and unlimited discretion to determine whether an offense had been committed," in contravention of constitutional principles. *Id.*

It seems, however, that defendant's primary challenge regarding the vagueness of the statute is that he was not on fair notice that it could apply to an exposure occurring through a cable network telecast, rather than one that was live and in-person. We have considered a similar argument in part II of this opinion, and we reiterate the conclusion reached there. The statute does not by its terms suggest, in any manner, that an "open or indecent exposure" can occur only if the exposing person and the victims subject to the exposure are physically in the same place. As we noted, the offense to those subjected to the exposure may, in fact, be greater if the exposure is accomplished through a television medium. The record seems clear that defendant intended to maximize the impact of his open or indecent exposure by using the cable medium, and we can see no reason to conclude that he was not fairly on notice that a criminal charge and conviction could result.

Finally, we note that this case involves a First Amendment argument, meaning that the statute might be subject to an argument that it is overly broad. *Id.* at 652, 579 N.W.2d 138. However, other than mentioning this in passing as part of his vagueness challenge, defendant makes no further First Amendment argument beyond that which we have already considered in part IV of this opinion. To the extent that defendant would raise a separate overbreadth argument, we consider that argument waived.

VI. Exclusion of Evidence and Jury Instructions

With respect to the manner in which his trial was conducted, defendant first argues that the trial court erred by excluding evidence regarding nudity in other television programming. The decision whether to admit evidence is

within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v. Katt,* 468 Mich. 272, 278, 662 N.W.2d 12 (2003).

Defendant presents only a cursory argument on this issue, without any supporting authority, and we consider this claim abandoned. *People v. Watson,* 245 Mich. App. 572, 587, 629 N.W.2d 411 (2001). Further, even if we were to conclude that defendant had preserved this claim and that it had merit, any error would be presumed harmless under M.C.L. § 769.26 unless it was outcome-determinative. *People v. Whittaker,* 465 Mich. 422, 426-27, 635 N.W.2d 687 (2001). Assuming, as we have today decided, that M.C.L. § 750.335a reaches defendant's conduct and that the statute is constitutional, the evidence of defendant's guilt is overwhelming. We do not conclude that, had defendant been allowed to introduce the evidence at issue here, the outcome of his trial would have been different.

Defendant also contends that various jury instructions he proffered to the trial court were improperly rejected. Again, however, defendant cites no authority in support of the instructions offered, and he has abandoned this issue. *Watson, supra.* And again, this argument fails on the merits, even if it had been properly presented. We review jury instructions in their entirety to determine if reversal is required on the basis of an error in jury instructions. *People v. Moldenhauer,* 210 Mich. App. 158, 159, 533 N.W.2d 9 (1995). If the jury instructions, taken as a whole, sufficiently protect a defendant's rights, reversal is not required. *Id.* Error requiring reversal only occurs if requested instructions (1) were substantially correct, (2) were not substantially covered in the charge given to the jury, and (3) concerned an important point in the trial so that failure to give them seriously impaired the defendant's ability to present a defense. *Id.* at 159-160, 533 N.W.2d 9. We have reviewed the instructions the trial court gave the jury and conclude that, taken as a whole, they accurately reflected the

elements of the crime charged and otherwise sufficiently protected defendant's rights. The additional instructions that defendant advocated were either erroneous as a matter of law, cumulative to the instructions actually given, or a reiteration of arguments defendant was allowed to present about how the case should be resolved. We conclude that the trial court did not err by failing to give the jury the additional instructions.

We affirm.

/s/ Richard A. Bandstra
/s/ Bill Schuette
/s/ E. Thomas Fitzgerald

Appendix C

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

THE PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff,

vs

Circuit Court Case No.
01-11061-AR
District Court Case No.
2000-SM-1326

TIMOTHY BRUCE HUFFMAN,

Defendant.
_____/

OPINION AND ORDER

At a session of this Court held on the 3rd day of November, 2003, at the Kent County Courthouse, Grand Rapids, Michigan.

Before the Court is the defendant's appeal of his conviction and sentence following a jury trial on charges of violation of MCL 750.335a, a Statute commonly referred to as the Indecent Exposure Statute for the State of Michigan. For the reasons set forth in this Opinion the conviction and sentence are AFFIRMED.

The conviction arises out of defendant's intentional and

knowing exposure for three minutes to over 46,000 homes in the greater Grand Rapids area of his or another person's penis and testicles on public access television. The defendant's appeal from the District Court is of right.

I. PROCEDURAL HISTORY OF THE CASE

The procedural history of this case is as follows. The charges against this defendant were brought to fruition when the case was filed on June 1, 2000. On that same day an arrest warrant was issued charging the defendant with having violated the Indecent Exposure Statute on or about April 7, 2000. The defendant was arraigned on that same day and pled not guilty. At that time a personal recognizance bond was ordered and a pretrial conference was scheduled. On June 28, 2000 a pretrial conference was held and on August 24, 2000 a hearing was conducted regarding any possible settlement of the case as is the practice in the 61st District Court. On August 24, 2000 a notice to appear was issued and sent to the defendant. On September 8, 2000 attorney Stephan Savickas was appointed to represent the defendant. On October 19, 2000 a hearing was conducted and subsequent hearings were scheduled for November 28, 2000 and March 26, 2001.

On February 9, 2001 defendant filed a Motion to Dismiss or alternatively an Evidentiary Hearing arguing MCL 750.335a did not apply to nudity in cable television programming; that on its face MCL 750.335a violated the United States and Michigan Constitutions because the statute was over-broad, vague and denied defendant of the equal protection of the law. Additionally, defendant argued his conduct was not obscene and, therefore, the airing of the images on a cable program was protected speech. This motion was supported by an eighteen page memorandum with ten pages of attachments.

On April 9, 2001, the prosecution filed a thirteen page response to defendant's motion and brief seeking dismissal or

an evidentiary hearing.

On June 6, 2001, the defendant filed a nine page rebuttal pleading to the prosecution's answer.

On August 28, 2001, the Honorable J. Michael Christensen issued a fourteen page opinion, attached to this opinion as Appendix A, denying defendant's motion. On October 11, 2001, Judge Christensen issued a one page order denying defendant's motion.

On October 31, 2001 defendant filed an Application Seeking Leave for Interlocutory Appeal to the Circuit Court pursuant to MCR 7.103(B)(1) with a fourteen page brief attached. On December 14, 2001, the Honorable H. David Soet, Judge of the 17th Circuit Court, granted leave to appeal. On January 18, 2002 defendant filed his papers, twenty pages in length, interlocutory, seeking reversal of Judge Christensen's denial of his Motion to Dismiss and substantively again, alleging all of the constitutional infirmities that he raised before the District Court. The prosecution filed its thirteen page responsive pleading on March 1, 2002.

On April 30, 2002, oral argument was held on defendant's interlocutory appeal. Judge Soet denied the appeal[1] and ordered the case remanded for further proceedings. At no time has defendant ever sought to have the Michigan Court of Appeals review pursuant to MCR 7.205 the April 30, 2002 decision of Judge Soet.

On December 2, 2002 defendant filed in the District Court a Motion to Reconsider the denial of the previous dismissal motion. Defendant filed on December 18, 2002 a response brief to the prosecutor's answer to the Motion to Reconsider.

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[1] The transcript of the appellate proceedings and Judge Soet's ruling are attached to this Opinion as Appendix B.

These requests were denied.

Defendant's jury trial took place on January 7, 2003. The jury, after receiving the evidence and hearing the Court's instructions deliberated for approximately one hour before returning a verdict of guilty.

The defendant was sentenced on February 19, 2003 to a term of twelve months Probation with conditions.

It is from this conviction and sentence the defendant appeals.

II. FACTS

Defendant is an adult resident of Kent County, Michigan. As either an avocation or a hobby, he has, prior to April 7, 2000, filmed himself and made videos of these filmings and thereafter provided them directly, independently, to the Offices of the Community Media Center, at Grand Rapids Television (GRTV).[2]

GRTV operates public access programs which allow everyday citizens the opportunity to submit tapes for airing to the cable television subscribers in the City of Grand Rapids. A producer, such as defendant was in this case, signs what is described as a legal document taking full responsibility for their program.[3]

On April 7, 2000, Episode 68 of "Tims Area of Control" was broadcast as part of the defendant's "regular GRTV series" (see page one of exhibit). The video tape which accompanied the application was a thirty minute episode including the three minute "Dick Smart" portion.

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[2] See Trial Transcript, January 7, 2003, pp 39, 45 and Exhibit from trial, "GRTV Application for Cablecast & Statement of Compliance" dated March 30, 2000 and signed by defendant.

[3] Trial Transcript, pp 39-40.

On April 7, 2000, the defendant, for three minutes, had broadcast, through his actions, to at least 46,000 households the naked image of his or someone else's penis and testicles.[4] The image takes up the entire screen of whatever standard monitor one is observing this tape from.

Simultaneous with the open viewing of this sex organ is a voice-over, similar in sound to defendant's voice elsewhere on the tape, that tells what have been characterized as jokes.

The evidence at trial clearly showed defendant and the defendant alone produced the tape that was provided to GRTV for public display. The evidence strongly indicated the defendant was the person filmed in every scene of the tape and that it was his own sex organs that were displayed for three minutes with voice-over. The evidence also shows that the defendant and the defendant alone provided the tape to GRTV and that at the time he provided it the defendant knew it would be broadcast in its entirety, unedited and without warnings into at least 46,000 homes[5] in Grand Rapids, Michigan.

The defendant also knew the display of the sex organs was inappropriate for children. This is demonstrated by the fact that before the episode aired, defendant placed a phone call to where he knew his own children would be and instructed them to "not

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[4] The evidence at trial strongly indicated that the penis and testicles displayed in the defendant's show were his own. The direct testimony of Cornelia Koslek indicated the defendant described putting markings on his sexual organs, draping himself or making a hole in material and then shrouding himself and then using words that could be taken two ways. The manner of which, how the defendant described exposing himself to Ms. Koslek is identical to the manner in which the penis and testicles shown in the tape provided by the defendant to GRTV in "Episode 68" took place for the three straight minutes of the display of the sex organs in the video tape.

[5] See Trial Transcript p 56.

to let the boys watch it, because its more for adults."[6]

On April 7, 2000 the video tape provided by the defendant was broadcast from 71 l Bridge Street NW in the City of Grand Rapids.

The exposure of the defendant's penis and testicles or someone's whom he filmed penis and testicles were observed by a complaining witness. That witness contacted the prosecutor's office. The case was eventually charged. During the time period preceding the trial, the defendant sought and obtained interlocutory review as discussed, *supra*. Following this interlocutory review Judge Soet denied the relief defendant sought. Defendant never appealed that decision but rather chose to go back to the trial Court; file and argue more motions; sought further reconsideration of constitutional claims by Judge Christensen; fully contested the facts; lost at trial before a jury; was convicted and sentenced.

It is this conviction and sentence the defendant now appeals to this Court.

III. ANALYSIS

A. Constitutional Challenges and the Law of the Case Doctrine

1. The Law of the Case Doctrine

The defendant challenges in this appeal the constitutionality of MCL 750.335a as applied to his conduct, his conviction by jury and his sentence.

MCL 750.335a provides in pertinent part:

> "Any person who shall knowingly make any open or indecent exposure of his or her person or of the person of another is guilty of

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[6] See Trial Transcript, p 76, testimony of Ronald L. Sukstas.

> a misdemeanor, punishable by imprisonment for not more than 1 year, or by a fine of not more than $1,000.00..."

This defendant has previously appealed the District Court's Opinion, found at Appendix A of this Opinion to the Circuit Court. The Circuit Court, the Honorable H. David Soet, in the Opinion found at Appendix B denied that appeal. At no time has the defendant sought review by the Michigan Court of Appeals of Judge Soet's decision.

In Michigan, the District Court is the trial Court for misdemeanor charges. The Circuit Court is the appellate Court for decisions made in the District Court. MCR 7.205 allows a party such as the defendant to seek review in the Court of Appeals of decisions such as those issued by Judge Soet in this case.

In the instant case, the defendant did not seek such a review, but rather chose to go back to the District Court, seek further review by the District Court Judge and to zealously defend the charge before a pettit jury. In the District Court the defendant was convicted. He now seeks to re-litigate the issues of the constitutionality of his prosecution under MCL 750.335a, raising essentially the same arguments he has raised three times previously [7], relying on nearly identical arguments and most of the same cases.

There exists in American jurisprudence a concept known as "The Law of the Case Doctrine".

In *Grievance Administrator v Lopatin*, 462 Mich 235 (2000) the Michigan Supreme Court wrote:

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[7] The first motion to dismiss in the District Court; the second, on the appeal of the denial of the motion by the Circuit Court; and the third, the Motion for Reconsideration in the District Court.

> Under the law of the case doctrine, "if an appellate Court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate Court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same." *CAF Investment Co. v Saginaw Twp.*, 410 Mich. 428, 454, 302 N.W.2d 164 (1981). [FN26] The appellate Court's decision likewise binds lower tribunal because the tribunal may not take action on remand that is inconsistent with the judgment of the appellate Court. *Sokel v. Nickoli*, 356 Mich. 460, 465, 97 N.W.2d 1 (1959). Thus, as a general rule, an appellate Court's determination of an issue in a case binds lower tribunals on remand **and the appellate Court in subsequent appeals**. *Webb v. Smith (After Second Remand)*, 224 Mich App 203, 209, 568 N.W.2d 378 (1997); see, generally, 5 Am.Jur. 2d, Appellate Review, § 605, p. 300. (Emphasis added.)

462 Mich at 261. In Footnote 26, the Court wrote:

> The "doctrine exists primarily to 'maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit.'" *Locricchio v. Evening News Ass'n*, 438 Mich. 84, 109, 476 N.W. 112 (1991), quoting 18 Wright, Miller & Cooper, Federal Practice & Procedure, § 4478, p. 788. It is premised on A need for finality of judgment and the want of jurisdiction of an appellate Court to modify its judgment except on rehearing, *Johnson v. White*, 430 Mich. 47, 53, 420 N.W.2d 87 (1988). *Id.*

In his comprehensive treatise on Michigan Law and Practice, the Honorable J. Richard Johnson of the Ninth Judicial Circuit in Kalamazoo County writes:

> Under the law of the Case Doctrine, an appellate Court ruling on a legal question binds lower tribunals in subsequent proceedings. *International Union, United Automobile, Aerospace and Agricultural Workers, UAW, Local 6000 v State of Michigan*, 211 Mich App 20, 24-25 (1995); *CAF Investment v Saginaw Township*, 410 Mich 428 (1981), *People v Prophet*, 110 Mich App 618, 625 (1980), and *Poirier v Grand Blanc Township (After Remand)*, 192 Mich App 539 (1992), *lv app den*, 441 Mich 931 (1992).
>
> The law of the case doctrine holds that a ruling by an appellate Court on a particular issue binds the appellate Court and all lower tribunals with respect to that issue. *Drive v. Haney (After Remand)*, 226 Mich App 558,565 (1997). Thus, a question of law decided by an appellate Court will not be decided differently on remand or in a subsequent appeal in the same case. *Id.* However, the doctrine does not preclude reconsideration of a question if there has been an intervening change of law. *Freeman v DEC Int'l.*, 212 Mich App 34, 38 (1995). For this exception to apply, the change of law must occur after the initial decision of the appellate Court. *Id.* Whether the law of the case applies is a question of law subject to review de novo. *Kalamazoo v. Dep't of Corrections (After Remand)*, 229 Mich App 132, 135 (1998); *Ashker v. Ford Motor Co.*,

245 Mich App 9, 13 (2001).[8]

While it is true *People v Wells*, 103 Mich app 455 (1981) and *People v Herrera*, 204 Mich App 333 (1993) indicate the law of the case "is not inflexible and need not be applied to create an injustice or where a prior decision is clearly erroneous," *Wells*, 103 Mich App at 463, they are distinguishable from the case at bar. In *Wells* the first trial Court made a clearly erroneous ruling holding a confession could only be used for a limited purpose. That ruling was not an issue in the initial appeal. As a result, on retrial, when the subsequent trial judge concluded the statement could be used for broader purposes than the first; the Court of Appeals in reviewing the case did not find the subsequent trial judge violated the law of the case doctrine. Id.

In *Herrera* the Court dealt with the imposition of sanctions on a *pro se* criminal defendant in post-conviction collateral review of his underlying conviction. There the Court of Appeals chose not to apply the law of the case doctrine as it related to the imposition of sanctions.

In its opinion, the Court of Appeals stated that fines were not permissible under 2.114(E). However, it noted that "in criminal cases, the law of the case doctrine does not automatically doom the plaintiff's arguments..." *Id.* at 341. The Court of Appeals stated that had sanctions been available, the decision to impose them "could have been independently reversed because the defendant was not afforded rudimentary due process before being sanctioned..." *Id.* Thus, *Herrera* appears to stand for the proposition that if due process is lacking the law of the case doctrine would not prevent the

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[8] Benchbook for Michigan Circuit Court Judges, J. Richard Johnson, Circuit Judge, 2002, p 176.

defendant from revisiting the issue. This case can be immediately distinguished from the case at bar. In the instant matter, the defendant is not arguing that there exists any deficiency of due process. In fact, the defendant has been afforded a full jury trial and review of that decision. It appears, therefore, that defendant's reliance on *Herrera* is misplaced.

These cases may be further contrasted to the instant appeal in that here the defendant raises what are essentially identical challenges to the legitimacy of his prosecution. In the instant case, the facts are identical at each stage of the appellate litigation; now as they were in the defendant's previous appeal. In the instant case, the defendant challenges the statute of conviction as applied to him as constitutionally defective because of over breadth and vagueness as he has done in all of his previous challenges and appeals.

The single exception to the redundancy of issues in this case is the defendant's assertion that he should not be prosecuted under MCL 750.335a because MCL 750.38 exists.

This additional statute provides:

> Sec. 38. DISPLAYING, ETC., PICTURES, ETC., REPRESENTING PERSONAL VIOLENCE OR HUMAN FORM--Any person who shall post, place or display on any sign board, bill board, fence, building, sidewalk, or other object, or in any street, road or other public place, any sign, picture, printing or other representation of murder, assassination, stabbing, fighting or of any personal violence, or of the commission of any crime, or any representation of the human form in an attitude or dress which would be indecent in the case of a living person, if such person so appeared in any public street, square or highway, shall be guilty of a misdemeanor.

The defendant argues that because this statute applies to representations of the human form, it was improper to prosecute the defendant in this case under MCL 750.355a. Because the prosecution has broad discretion in determining which statute to charge, absent an abuse of discretion, the specific statute selected will not give rise to a successful challenge on appeal. See *People v Ford*, 417 Mich 66, 92 (1982).

Because the defendant chose not to seek interlocutory review of his previously raised constitutional challenges, the law of the case doctrine proscribes his ability to do so at this juncture. To hold otherwise would reward a party who seeks review, looses, then seeks to proffer his case to a trier of fact making all trial arguments and then upon these efforts being unsuccessful yet again seeking appellate review. This practice is contrary to the long standing principals of issue ajudication as are reflected in *Attorney Grievance v Lopatin*. Such a decision would lead to the constant and endless re-litigation of issues indefinitely and give no finality of judgment to any party. This result is contrary to the proper rule of law; would undermine significantly the confidence of parties and the public in rulings of courts and would materially increase the cost, length and uncertainty involved in litigation.

Our system of jurisprudence works because the participants in the process follow the substantive and procedural rules. The defendant in this case was free to seek interlocutory to view of the District Court's Opinion found at Appendix A. When he did, however, and lost[9] it was then incumbent upon the defendant to seek further review of that decision by the Michigan Court of Appeals or to be bound to it forever. When defendant failed to seek further review and instead to go back and try the case to the jury, he abandoned the constitutional

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[9] See Appendix B.

challenges he now seeks to raise again in this Court.

For the reasons stated above the law of the case doctrine proscribes this defendant from raising these constitutional challenges a further time.

2. Constitutional Challenges to MCL 750.335a as Applied to this Defendant

Assuming, *arguendo*, the law of the case doctrine did not bar the re-litigation of these issues the defendant would nonetheless still be unable to prevail in his constitutional challenges to his prosecution under MCL 750.335a for the reasons set forth below.

MCL 750.355a [10]proscribes the open or indecent exposure of ones self or another. The defendant argues the statute does not apply to his conduct because his conduct did not occur in an open place; because the statute is vague and over broad and because if the statute applies to defendant's conduct it violates the First and Fourteenth Amendments of the United States Constitution.

Regarding whether the conduct of the defendant happened in an open place; the record clearly demonstrates that the defendant, through his conduct exposed either his own or another's penis and testicles to 46,000 homes in the City of Grand Rapids, Michigan. He did this by providing the video

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[10] 750.335a. in its entirety provides:

"Any person who shall knowingly make any open or indecent exposure of his or her person or of the person of another is guilty of a misdemeanor, punishable by imprisonment for not more than 1 year, or by a fine of not more than $1,000.00, or if such person was at the time of the said offense a sexually delinquent person, may be punishable by imprisonment for an indeterminate term, the minimum of which shall be 1 day and the maximum of which shall be life: Provided, That any other provision of any other statute notwithstanding, said offense shall be triable only in a court of record."

tape of Episode 68 to GRTV located at 711 Bridge St., NW, Grand Rapids, Michigan and requesting them to air the video tape and by doing so defendant knowingly, intentionally and deliberately exposed his or another's penis and testicles to the 46,000 television subscribers in the City of Grand Rapids alone.

The defendant argues this prosecution is unprecedented in the nation. While that may or may not be the case, it is equally possible, that no other person in the nation has ever tried to directly have placed in the homes of totally unsuspecting citizens of an entire metropolitan area a viewing for three uninterrupted minutes a close-up image of a person's genitals.

If there has ever been such a display in any state or commonwealth in the land, the Court can only assume that in the thoughtful and well researched pleadings that have been submitted by the defendant on this appeal and by the amicus brief submitters that this fact or facts would have certainly been brought to the attention of the Court yet they were not. While the prosecution of the defendant may be unprecedented it is equally possible, that the conduct of the defendant giving rise to the prosecution is also unprecedented.

Nonetheless, an analysis of the proper scope of the applicability of the statute at issue is still appropriate.

The statute at issue makes it unlawful to knowingly make **any** open or indecent exposure of one's person or the person of another. MCL 750.335a (emphasis added). The language of statutes are to be given their plain and ordinary meanings. *People vs Aldrich*, 246 Mich App 101 (2001).

Webster's New College Dictionary 1995, defines "any" as follows:

> **1.** One or some, regardless of sort, quantity or number **2.a.** One or another selected at random **b.** One or another without restriction or

> exception . . ., *pronoun* **1.** Any one or ones among three or more **2.** Any quantity or part . . . *adv* To any degree or extent. Id. At p. 51.

"Open" is defined as:

> **1.a.** Affording unobstructed entrance or exit **b.** Affording Unobstructed passage or view . . .
>
> **Syns 1.** open, exposed, uncovered, unprotected *adj. core meaning*: having no protective or concealing cover. Id. at 766.

In analyzing the applicability of this statute, the Michigan Court of Appeals has concluded that there is no requirement that defendant's exposure actually be witnessed by another person to constitute "open or indecent exposure," within the meaning of the indecent exposure statute, as long as the exposure occurred in a public place under circumstances in which another person might reasonably have been expected to observe it. *People v. Vronko* (1998) 579 N.W.2d 138, 228 Mich. App. 649, appeal denied 590 N.W.2d 66, 459 Mich. 945.

Likewise prosecution for indecent exposure has not been barred simply because charged conduct was performed before a theater audience which was comprised primarily or even totally of consenting adults. *People v. Wilson* (1980) 291 N.W.2d 73, 95 Mich. App. 440.

In *Vronko*, the court concluded that the indecent exposure statute provided fair notice to defendant that the act of exposing one's penis and masturbating while seated in an automobile parked on a public street with its window open was conduct proscribed by statute and did not confer on the trier of fact unstructured and unlimited discretion to determine whether an offense had been committed in the context of the charged conduct; therefore, the statute was not unconstitutionally vague as applied to defendant. *Id.*

In analyzing the statute, the court wrote:

> With respect to the common uses of the words contained in the statute, *Webster's New Collegiate Dictionary* (1977) defines "open," in part, as being "exposed to general view or knowledge," "having no protective covering," and "to disclose or expose to view." Likewise, the word "exposure" is defined as meaning a "disclosure to view" especially of "a weakness of something shameful or criminal." *Id.* "Indecent" is defined as "grossly unseemly or offensive to manners or morals." *Id.* Finally, "indecent exposure" is defined as being an "intentional exposure of part of one's body (as the genitals) in a place where such exposure is likely to be an offense against the generally accepted standards of decency in a community." *Id.* Given these definitions and judicial constructions, the language of the indecent exposure statute (1) provided fair notice to defendant that the act of exposing one's penis and masturbating while seated in an automobile parked on a public street with its window open was conduct proscribed by the statute, and (2) did not confer on the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed in the context of the charged conduct. Therefore, we hold that the indecent exposure statute was not unconstitutionally vague as applied to defendant. *Hubbard, supra* at 484, 552 N.W.2d 493. *Id.* at 653-654.

Finally, in comparing the statutory analysis with the common law, the *Vronko* court cited with approval former Michigan Supreme Court Justice Boyle's concurring opinion in

In re Certified Question, 420 Mich 51, 63, 359 N.W.2d 513 (1984) where she [d]efined "open exposure" under the indecent exposure statute as being "any conduct consisting of a display of any part of the human anatomy under circumstances which create a substantial risk that someone might be offended." According to Justice Boyle,

> "[t]his standard would require evaluation of the setting in which the exposure took place in order to determine whether anyone might reasonably have been expected to observe it and, if so, whether the person might reasonably have been expected to have been offended by what was seen." *Id.* Justice Boyle's definition, although not binding on this Court, is consistent with the common-law interpretation of the offense, and nothing in the language of the statute suggests that the Legislature intended to modify the common-law interpretation of the offense, and nothing in the language of the statute suggests that the Legislature intended to modify the common-law interpretation. For these reasons, we hold that there is no requirement that the defendant's exposure actually be witnessed by another person in order to constitute "open or indecent exposure," as long as the exposure occurred in a public place under circumstances in which another person might reasonably have been expected to observe it. *Vronko* at 656.

Applying these standards and definitions to the facts at bar it is patently clear that the intentional provision of the video tape and the causing of it to be displayed openly to thousands upon thousands of homes in the City of Grand Rapids, and many more thousands of homes in the outlying communities near Grand Rapids in Kent County meets the statutory

definition of "any open or indecent exposure of his or her person or of the person of another."

The constitutional challenges made by the defendant and his reliance on *Erznoznik v City of Jacksonville*, 422 US 205 (1975) and *United States v Playboy Entertainment Group, Inc.* 529 US 803 (2000) are unavailing.

In *Erznoznik*, the Court struck down a Jacksonville ordinance which made any employee or any person connected with a drive-in theater that exhibited any movie which displayed the human male or female buttocks, the female breasts or human bare pubic areas, if the display is visible from any public street or place, guilty of a misdemeanor. *Erznoznik* at 207. The Court found this Ordinance to be far too broad to survive constitutional scrutiny. In commenting on what a legislative body may do, however, the Court wrote, "It is well settled a State or a Municipality can adopt more stringent controls on communicative materials available to youths than on those available to adults." *Id.* at 212.

In the instant case, the challenged statute does not per se criminalize all exposure but only indecent exposure. Likewise, when instructing the jury below, the trial Judge properly instructed that they "must decide whether the act was improper and indecent according to community standards of decency and morality." (Record of trial, p. 145). In *Erznoznik* the stricken ordinance had no such requirement and anyone, specifically including even a ticket seller was per se guilty of a misdemeanor if any of the proscribed areas of the human body were displayed no matter the length of time, content or other potentially relevant and mitigating factors. This the Court found to be too broad.

The instant case and facts are significantly different from those in *Erznoznik*. Here defendant produced, filmed, displayed, distributed and exposed for three uninterrupted

minutes his or another's penis and testicles. The jury was properly instructed as to all elements of the statute and after deliberating concluded the defendant had violated the statute.[11]

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[11] Judge Christensen's instructions regarding the elements of the charged offense were as follows:

To prove this crime, the prosecution must prove each of the following elements beyond a reasonable doubt: First, the defendant exposed his penis or the penis of another; second, that the defendant knew he was exposing his penis or the penis of another; third, that the defendant did this in a public place in which another person in the public may have been expected to observe this; fourth, that the defendant did this on April 7th of the year 2000 here in the City of Grand Rapids; fifth, if you find that the act was committed, you must decide whether the act was improper and indecent according to community standards of decency and morality. In determining this, you must think about the nature of the act, and all the circumstances surrounding the act.

One of the elements of the crime of indecent exposure is that the exposure be in a public place. This does not require that the exposure be done in person. An exposure is done in a public place if it is done in such a way, that is reas -- that it is reasonable to believe that someone in the public may have been accepted (sic) expected to observe it and be offended by it.

I'll re-read that, because I made two mistakes while I was reading it.

One of the elements of the crime of indecent exposure is that the exposure be in a public place. This does not require that the exposure be done in person. An exposure is done in a public place if it is done in such a way, that it is reasonable to believe that someone in the public may have been expected to observe it and be offended by it.

If you find beyond a reasonable doubt that the defendant videotaped his penis, or the penis of another, and submitted the videotape to a public access television station, that the station, in fact, ran the videotape, and that someone in the public would reasonably be expected to observe this, this would establish the element that this be done in a public place.

This crime of indecent exposure requires proof of a specific intent. This means that the prosecution must prove not only that the defendant did certain acts, but that he did these acts with the intent to cause a particular result. For the crime of indecent exposure, this means that the prosecution must prove

In *United States v Playboy Entertainment Group, Inc.*, 529 US 803 (2000), also relied on by the defendant, the Court struck down §505 of the Telecommunications Act of 1996, Pub.L. 104-104, 110 Stat. 136, 47 USC § 561 (1994 Ed., Supp. III) which required cable television operators who provided channels "primarily dedicated to sexually-oriented programming" either to "fully scramble or fully block" those channels or to limit their transmission to hours when children are unlikely to be viewing. The Court found §505 was content-based speech restriction that could stand only if it met strict scrutiny requirements.

In the case at bar, MCL 750.335a proscribes conduct. It is not a statute that in broad and all encompassing language proscribes protected speech. It is rather like the Indiana statute at issue in *Barnes v Glen Theatre, Inc.*, 501 US 560 (1991) a proper limitation of conduct pursuant to the analysis required by *United States v O'Brien*, 391 US 367 (1968).

In *O'Brien*, cited by all parties in their submissions to this court in the instant case; the Supreme Court of the United States upheld the conviction of a defendant in an event related to his burning of his draft card during the height of the Viet Nam War. *O'Brien* claimed his conviction was violative of the First Amendment. The court rejected this argument as applied to symbolic speech stating:

> (E)ven on the assumption that the alleged communicative element in O'Brien's conduct is

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that the defendant intended to expose his penis or the penis of another. The defendant's intent may be proved by what he said, what he did, how he did it, or by any other facts and circumstances in this case.

The facts -- or the evidence must convince you beyond a reasonable doubt that the crime occurred in the City of Grand Rapids. Record of Trial, pp 145-146.

> sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.*, at 376-377, 88 S.Ct., at 1678-1679 (footnotes omitted).

In *Barnes* the Supreme Court upheld an Indiana Public Indecency Statute, applying *O'Brien*. There, the Court wrote:

> Applying the four-part *O'Brien* test enunciated above, we find that Indiana's public indecency statute is justified despite its incidental limitations on some expressive activity. The public indecency statute is clearly within the constitutional power of the State and furthers substantial governmental interests. It is possible

> to discern, other than form the text of the statute, exactly what the governmental interest the Indiana legislators had in mind when they enacted this statute, for Indiana does not record legislative history, and the State's highest court has not shed additional light on the statute's purpose. Nonetheless, the statute's purpose of protecting societal order and morality is clear from its text and history. Public indecency statutes of this sort are of ancient origin and presently exist in at least 47 States. Public indecency, including nudity, was a criminal offense at common-law roots of the offense of "gross and open indecency" in *Winters v New York*, 333 US 507,515, 68 S Ct 665, 670, 92 L.Ed. 840 (1948). Public nudity was considered an act *malum in se*. *Le Roy v Sidley*, 1 Sid. 168, 82 Eng. Rep. 1036 (KB 1664). Public indecency statutes such as the one before us reflect moral disapproval of people appearing in the nude among strangers in public places. *Barnes* at pp 567 568.

A similar conclusion results in the instant case. The statute of conviction in the instant case proscribes the *conduct* the defendant engaged in, not his speech.

Barnes, *O'Brien* and the Michigan Indecent Exposure Statute all have one critical element in common. They all deal with the regulation of proscribed conduct. Juxtaposed to this the *Playboy* case dealt with a regulation by the federal legislature of the media; the press; by its very language.[12] The

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[12] Additionally, it should be noted, the procedural context of *Playboy* was dramatically different from the matter at bar. In that case; the appellee, Playboy Entertainment Group, when becoming aware of §505 sought injunctive relief; immediately preserving all of their rights and properly

statute at bar has no such facial infirmities.

Additionally, *Schad v Borough of Mount Ephraim*, 452 US 61 (1981) is distinguishable from the instant case. In *Schad*, the Court set aside an ordinance which excluded all live entertainment in the municipality, including plays, concerts and musicals. 452 US at 67. These proscriptions were simply too broad to survive constitutional scrutiny.

At the heart of defendant's challenges is, of course, the First Amendment.

The First Amendment to the United States Constitution provides in part:

> "Congress shall make no law . . ., abridging the freedom of speech or of the press . . ."

The adoption of the Fourteenth Amendment removed any doubt that may have existed as to the applicability of the First Amendment to the several states.

The guarantee of freedom of speech and freedom of the press have consistently been recognized under each of Michigan's Constitutions.

The Constitution of 1835 provided:

Freedom of speech and press.

> 7. Every person may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of

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bringing issues before the appropriate courts. In the instant case on the other hand, the defendant, when facing prosecution under what he has consistently alleged is an unconstitutional statutory scheme, he failed to properly preserve the issues when he abandoned his appeal in 2002 by failing to even petition for additional interlocutory review.

> speech or of the press. In all prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact. Art. I, §7.

The Constitution of 1850 provided:

Liberty of speech and press.

> Sec. 42. No law shall ever be passed to restrain or abridge the liberty of speech or of the press; but every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of such right. Art. IV, §42.

The Constitution of 1908 provided:

Liberty of speech and of press

> Sec. 4. Every person may freely speak, write and publish his sentiments on all subject, being responsible for the abuse of such right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. Art. II, §4.

The current Constitution of this State, the Constitution of 1963 provides:

§ 5. Freedom of speech and of press

> Sec. 5. Every person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right; and no law shall be enacted to restrain or abridge the liberty of speech or of the press. Art I, §5.

As the *Barnes* opinion indicates, indecent exposure statutes have long existed in Anglo-American legislative enactments. These enactments pre-dated the adoption of the United States Constitution by over one hundred years and the first Constitution of the State of Michigan by over one-hundred and seventy years. The enforcement of indecency statutes has peacefully coexisted with the constitutional protections of the press and of speech because it is the prosecution of public conduct not speech that is their hallmark.

Denver Area Educational Telecommunications Consortium v The Federal Communications Commission, 518 US 727 (1996) which characterizes public access channels, such as GRTV, as public fora notes, "[P]ublic fora do not have to be physical gathering places"[13] supports this continued co-existence even when the open place is through public access cable television.

Further buttressing this conclusion is *People v Wilson*, 95 Mich App 440, 442 (1980) where the defendant was a nude dancer at an adult theater in Detroit. She brought a motion to quash her prosecution maintaining that the indecent exposure statute was an invalid infringement on her First Amendment rights, that the statute failed to adequately describe the conduct which was proscribed, that the statute failed to give fair notice and that audience consent nullified the indecent exposure charge.

In *Wilson* the court wrote:

> A prosecution for indecent exposure is not

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[13] That part of the Denver court opinion which set aside portions of the challenged statute does not strengthen defendant's position for the same reason the Playboy decision did not; in both cases the infirm statutory language specifically limited the press and did so in a manner not narrowly enough drawn. Here, the statute simply does not limit the press, but conduct.

> beyond the scope of M.C.L, s 750.335a; M.S.A. s 28.567(1); simply because the charged conduct is performed before a theater audience which is comprised primarily or even totally of consenting adults. *Wilson* at 443.

The majority opinion concluded stating:

> In the present case, the statute is not designed to prohibit speech. Expressive conduct, not pure speech, is regulated and the statute's application to conduct protected by the First Amendment is, at most, minimal. We believe that there are a substantial number of situations to which the statute can validly be applied and that there is no substantial overbreadth. *Broderick*, *supra*, 413 U.S. 615, 93 S.Ct. 2917. Accordingly, we find that the lower court incorrectly granted defendant's motion to quash and we reverse. *Wilson* at 446.

The defendants actions in the instant case, as did the defendant's action in *Wilson*, constituted conduct reasonably and foreseeably proscribed by MCL 750.335a. Applying the statute to defendant's conduct is neither overbroad or overreaching. Neither vexatious nor vague.

The proofs at trial demonstrated the defendant knowingly and intentionally made an open display of his or another's sex organs for three uninterrupted minutes to 46,000 homes in Grand Rapids. It was conduct legitimately and reasonably proscribed by the statute of conviction.

3. Overbreadth and Vagueness Challenges

The defendant asserts that the statute of conviction as applied to him is overbroad. *Wilson*, *supra*, leads this Court to another conclusion. The Michigan Court of Appeals rejected

defendant's overbreadth arguments in that case. That decision is controlling precedent for this Court.

The overbreadth argument is rejected.

The defendant also asserts that the statute of conviction is vague and, therefore, constitutionally infirm. *Vronko*, *supra* rejects this contention and that decision is controlling precedent for this Court.

The vagueness argument is rejected.

B. Additional Trial Errors Alleged by Defendant

1. Exclusion of Evidence of Nudity in Other Television Programs

The defendant asserts that the exclusion of evidence about nudity in other television programs, questions to the complaining witness about what she watched on television and evidence about Federal Communications Commission roles related to safe harbor periods was reversible error.

An appellate court reviews a trial court's decision on the admissibility of evidence for an abuse of discretion. *People v Sabin*, 463 Mich 43, 60 (2000); *People v Aldrich*, 246 Mich App 101, 113 (2001) and *People v Starr*, 457 Mich 490, 494 (1998).

In order to find an abuse of discretion, "the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will." *Spalding v Spalding*, 355 Mich 382, 384-385 (1959).

A review of the entire record does not show the challenged evidentiary rulings were an abuse of discretion. What was at issue in the instant case was the defendant's conduct, not that of another. Additionally, in his closing argument defendant's counsel, in fact, argued regarding the presence of nudity in other television programs (Record of Trial, p. 128, lines 4-6) as

well as so argued for the jurors to use their common sense in relation to what the import of the evidence of nudity was in this case as compared to their common every day experiences and community standards. (Record of Trial, p. 133, lines 21-25). The trial Judge committed no error in the challenged evidentiary rulings and in the event that they were in error the error was harmless in light of the entire record and cannot serve as a basis to overturn the jury's verdict.

2. Denial of Directed Verdict

A review of a trial Court's denial of a motion for directed verdict is a review de novo of the evidence to determine if the evidence, when examined in the light most favorable to the non-moving party, could satisfy a rationale trier of fact that beyond a reasonable doubt, by admissible proofs, that all the elements of the charged offence were shown. *People v Mayhew*, 236 Mich App 112, 124-125 (1999).

In the matter at bar, the prosecution was required to show the defendant had:

(1) exposed his or another's penis;

(2) the defendant knew he was exposing his or another's penis;

(3) that the defendant did these things in a public place in which another member of the public could reasonably have been expected to observe this;

(4) that the defendant did this on April 7, 2000 in the City of Grand Rapids; and,

(5) that the act committed by the defendant was improper and indecent according to community standards of decency and morality.

The proofs at trial, when considered in the light most favorable to the prosecution satisfy each of the above elements.

Here, the defendant exposed his or another's penis and testicles to over 46,000 homes. He himself produced the device by which the exposure took place and personally submitted it to GRTV for release. He provided the device to GRTV in the City of Grand Rapids. He did all these things knowing it would cause the open exposure to take place on or about April 7, 2000. These actions were improper and indecent as judged by the standards of the community of Grand Rapids, Michigan.

The defendant's argument that his motion for directed verdict was improperly denied is without merit.

3. Jury Instructions

The defendant challenges both the instructions given and argues it is reversible error that defendant's proposed instructions 3(b), (c), (e) and (f) were not given. The defendant argues the Court's instructions amounted to directing a verdict of guilt against the defendant.[14]

It is the function of the, trial court to clearly present the case

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[14] The defendant's proposed instructions were as follows:

Instruction 3(b): "You must first decide whether all of the TV show, taken in its entirely, both the photographs and the audio, were intended by the defendant to convey any idea, thought, or concept. If the whole work, in its entirety, was intended to express an idea, message or concept by the defendant, then you must find the defendant not guilty."

Instruction 3(c): "The prosecution must prove beyond a reasonable doubt that the defendant's performance, taken as a whole, had no expressive or entertainment value of which the nudity was an integral part,..."

Instruction 3(e): "Entertainment may not be prohibited by the criminal law simply because it displays the nude human figure."

Instruction 3(f): "In determining whether defendant's performance has expressive or entertainment value, you must not base your decision on your personal reaction to the performance or whether you find it offensive."

to the jury and instruct them on the applicable law. *People v Katt*, 248 Mich App 282, 310 (2001). Jury instructions are reviewed in their entirety to determine if error requiring reversal occurred. *Id.*

Jury instructions are to be read as a whole rather than extracted piecemeal to establish error. *People v Dabish*, 181 Mich App 469, 478 (1989). The reviewing court must balance the general tenor of the instructions in their entirety against the potentially misleading effect of a single isolated sentence. *People v Freeland*, 178 Mich App 761,766 (1989), *lv app den.* 434 Mich 903, *cert den*, 498 US 853(1990). Even if somewhat imperfect, instructions do not create error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Wolford*, 189 Mich App 478, 481, *lv app den*, 439 Mich 899 (1991).

The trial court committed no error in refusing to give defendant's proposed instructions 3(b) and (c) because simply put, they were erroneous as a matter of law for the reasons set forth *supra*. The defendant would have the Court instruct if his actions were intended to convey **any** idea, thought or concept then the jury must find the defendant not guilty. Similarly, the defendant argued there must be **no** expressive or communicative value. Were this the case, *O'Brien* and *Barnes* would have been decided differently. They were not. The defendant's theory of what the law was and is, was and is mistaken.

The trial Court likewise committed no error when it declined the defendant's request to give 3(e) and (f) because they were incomplete and were not of enough clarity that they would have assisted the jury in this case.

A review of all of the instructions provided to the jury in this case reveals a materially complete statement of the law the jury had a duty to apply and when read as a whole, appropriate.

4. The Failure to Quash the Search Warrant

The defendant asserts that because the first magistrate who was petitioned to issue a search warrant declined to do so the trial Court was obligated to conduct an evidentiary hearing to examine what transpired. What the defendant does not do in this appeal, nor did he do before the trial Court, is assert there was an absence of probably cause.[15] There not being any assertion that there was an absence of probable cause, the trial Judge did not commit error in refusing to grant the evidentiary hearing sought by defendant.

WHEREFORE:

After reviewing the pleadings submitted, the record from the trial Court, all materials related to the previous interlocutory appeal filed by the defendant and the oral arguments of the parties, the Court finds as follows:

1. The law of the case doctrine proscribes this defendant from being able to raise the constitutional challenges he makes to MCL 750.335a and its application to him for the reasons set forth *supra*;

2. Even if the law of the case doctrine did not proscribe the review of these claims, if they were considered substantively, the challenges would be without merit for the reasons set forth *supra*; and

3. The additional assignments of error related to the manner in which the trial Court conducted the trial, denial of a directed verdict, the jury instructions and the failure to quash the search warrant are all without merit.

The defendant in this case was charged with violating MCL

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[15] The primary argument as to this issue appears to be because the underlying conduct is not a crime, there could not be probable cause.

750.335a which makes it unlawful for a person to make any open or indecent exposure of his person or the person of another. He caused, on April 7, 2000, his penis or that of another to be displayed to 46,000 homes in the City of Grand Rapids from a location originating at 711 Bridge Street NW, Grand Rapids, Michigan. For three uninterrupted minutes, with no warning or notice, the full exposure of a man's penis and testicles was sent into all of these 46,000 homes and more.

The conduct was properly prohibited under MCL 750.335a.

The defendant's conviction and sentence are **AFFIRMED**.

/s/

November 3, 2003 James Robert Redford, Circuit Judge

Appendix D

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiffs,
v.
TIMOTHY BRUCE HUFFMAN,
Defendant.

TRANSCRIPT OF PROCEEDING
BEFORE THE HONORABLE H. DAVID SOET
Friday, April 30, 2002
Grand Rapids, Michigan

APPEARANCES:

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FOR THE DEFENDANT: Stephan Savickas (P44617)
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Reported by: Shawn M. Breimayer, CSR (6888)

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Witnesses:
(None)

EXHIBITS:
(None marked)

(Commenced at _____)
THE COURT: Okay. People versus Huffman. This is the time for oral argument.
MR SAVICKAS: Good afternoon, your Honor.
THE COURT: Good afternoon.
MR. SAVICKAS: I'm sure you've read the briefs on both sides.
The court: Yes, I have.
MR. SAVICKAS: I'm not going to waste a lot of the Court's time here. The question before the Court is whether the indecent exception criminal statute apply in this case. We feel it is not applicable as the state has propositioned. Obviously, there's a constitutional law here of free speech and the first amendment.
The state's position is that this case has nothing to do with speech. The defense's position is that the case has nothing to do with conduct. There's a common ground here where both sides agree that the indecent exception

statute applies only to conduct, therefore, the first focal point -- the pivotal issue here is for the Court to decide whether this case involves A, speech, B, conduct, or C, the combination of speech and conduct.

Now, at the Supreme Court level, there's no confusion as set forth in the Miller versus California. And, in this case, nude scenes are distinguishable from public

nudity, and in fact, the recent decision by Supreme Court by virtual child porn, which I just got a hold of today -- I have a copy for the Court and the prosecutor to look at if necessary -- are same or similar circumstance.

But, on page 11, I thought made an interesting and relevant statement. The Court's first amendment cases draw vital distinctions between words and deeds between ideas and conduct. That's on page 11. I'll submit this for the Court in case it would like to review it later. So, in this respect, there is no conduct to apply the statute to in this case. There is no constitutional entanglement for the Court to wrangle with.

And also, for guidance, the Justice Kennedy, in his concurring opinion in the Denver case -- and that's the same concurring opinion relied on by the lower court for it's analogy to public forum. It addresses three main topics regarding the constitutionality of cable TV programming. It talks about -- I'll provide that to the Court as well. But there's three main points there. The setting. By that, I mean artistic setting.

Second of all, the category. And we're talking about conduct or speech. Well, Justice Kennedy sets forth that he categorizes it as speech and he sub-classifies it as indecent speech; not indecent conduct. He further explains that indecency is often indivisible from the

message that is being conveyed. In other words, the indecent photographic images are combined with the spoken words, and collectively, it's all speech. Protected speech. If the Court would like, I would recite that passage for the record.

THE COURT: I assume that you're quoting an opinion of the Supreme Court?

MR. SAVICKAS: Yes. I do have a copy for the Court to look at, and I also have one for my distinguished colleague here. Referring to the bottom of page 804; the case. That paragraph I'm referring to on the bottom with the interest of children that are at stake here. These concerns are weighty and will be relevant to whether the law passes strict scrutiny. They do not justify, however, a blanket rule of lesser protection for indecent speech.

There's been a few categories of expression that can be described -- he gives a cite there for defamation and reciting a riot -- we have been reluctant to mark off new categories of speech for diminished constitutional protection. Our hesitancy reflects skepticism about the possibility of courts' drawing principled distinctions to use in judging governmental restrictions on speech and ideas, a concern heightened here by inextricability of indecency from expression. We cannot indulge the facile assumption that one can forbid particular words without

also running a substantial risk of suppressing ideas in the process. The same is true of forbidding programs indecent in some respect. In artistic or political settings, indecency may have strong communicative content, protesting conventional norms or giving an edge to a work

by conveying "otherwise inexpressible emotions." In scientific programs the more graphic the depiction, (even to the point of offensiveness), the more accurate and comprehensive the portrayal of the truth may be. Indecency often is inseparable from the ideas and viewpoints conveyed, or separable only with loss of truth or expressive power. That in a nutshell is our argument.

THE COURT: Thank you. You're Mr. Kent?

MR. KENT: Yes, your Honor. Good Afternoon.

THE COURT: Good afternoon.

MR. KENT: I'd like to note that the portion of the Denver opinion that counsel read to the Court was from Justice Kennedy, and that was a plurality decision. And there was -- that text that he was reading does not constitute the law of the case from the Denver decision, and we have set forth our arguments in our brief.

And it's our position that this prosecution is only designed to reach the conduct that took place on the television program. It does not seek to restrict or regulate the speech that he engaged in, but merely the

conduct. And I rely ___est on the arguments in our brief, unless you have any more questions.

THE COURT: Thank you, Mr. Kent. I'll give an opinion from the bench. The first issue we must consider is the standard of review in this case. We conclude, as this case involves not questions of fact as all the facts are essentially stipulated to, but rather constitutional issues raising questions of law we must consider de novo.

People versus Louis 218 Michigan Appellate 447, 451, 1996. I believe this case breaks down into essentially two issues. First of which is whether planning this display by defendant violates his rights under the first

amendment guaranteeing free expression.

The statute which the prosecution attempts to enforce is MCL 750.335A, which reads, "Any person who shall knowingly make an open or indecent exposure of his or her person or of the person of another shall be guilty of a misdemeanor punishable by imprisonment in the county jail for not more than one year or by fine of not more than $500, or if such person was, at the time of said offense, a sexually delinquent person may be punishable by imprisonment in the state prison for an undetermined term. The punishment of which shall be one day, the maximum of which shall be life, provided that any other provision of any other statute notwithstanding said offense shall be

triable in the court of record."

This statute has been upheld in the face of assertions that it was unconstitutional via People versus Vronko 228 Michigan Appellate 649, 652, 654, 1998 application delayed. 459 Michigan 945, (1999). The Court of Appeals in Vronko noted that the case did not implicate first amendment freedoms implying we believe that freedom of speech and expression may be a consideration in an appropriate case. That specifically, we refer counsel to People v Howell 396 Michigan 16, 20, 21, (1996), which notes that same distinction.

We thus must resolve the question of whether this -- while in this case the statute and opinions depend upon defendant's right to free expression. Initially, we find that the statute is aimed at specifically identifiable and easily identifiable conduct as opposed to speech. The prosecution does not assert that anything defendant Huffman said violates any criminal statute. However, some acts may constitute similar speech. For instance, the

flag may express political protest. This case does not resemble that circumstance.

Additionally, speech may, in some circumstances, be combined with conduct. In such instances the conduct still may be suppressed if the statute is within the constitutional power of the state. It further is an

important substantial or government interest. The governmental interest is unrepresented to suppression of free expression and the restriction is no greater than necessary.

US v O'Brien 391 US 367 (1968), this statute meets such criteria prohibiting open displays of body parts, in forensic to reproductive functions, has been repeatedly upheld in this and other states. This state does have a substantial interest in maintaining order by maintaining commonly accepted standards of decency and morality. Such displays are not directly related to the free expression and exchange of ideas.

And, finally, imposition of this law does not restrict first amendment rights any further than necessary to the protection of that interest. We are keenly aware of the limitations that the first amendment imposes on this statute. State's performances such as Old Calcutta are plays written by professionals performed by professional actors and dancers and seen only by persons who choose to pay to see them.

Open nudity and sexually explicit exchange on TV accompanied by warnings of their nature are also accepted presence of fact; works of art. By way of example, Michelangelo's David or Goya's Naked Maja are not expressions of a person; they are stone and canvas, and

they are also works of art which are within the parameters of guarantee of free expression.

Defendant's conduct, on the other hand, bears a strong resemblance to a flasher in a schoolhouse offense. He exposes his penis with a face painted on it, makes a few off color references to it, and tells one not particularly funny joke in the course of a three minute monologue. His performance appeared on Grand Rapids public access cable channel where any member of the public would happen upon it unexpectedly and without warning. Thus, his expression was different than those previously mentioned; it was open to all to see.

Further to describe his performance as artistic does, in my judgment, violate the meaning of the English language, which no court is required to tolerate. There may be circumstances which will present issues of whether a particular body display falls within contemporary community standards relative to public nudity, thus comes within the broad area of the guarantee. That does not appear to be this case.

In such cases presented, it will present a fact question for a jury to determine upon proper instructions relative to constitutional guarantees. The second issue of the case is whether this statute applies to other than personal physical exposures. The defendant asserts that

it does not apply to his performance because it was videotaped. He asserts that the statute does not apply to television programming. We consider this to be the essential serious issue in this case.

Our Supreme Court stresses the need to interpret the statute according to their language. While we can find no

statute which the statute interprets, which is why a video tape is a series of photographs creating a moving image of the subject, we can find nothing in the law passed by the legislature which excludes it. It is, at least, interesting, if not perhaps instructive, to note that the law specifically applies not only to persons who expose themselves, but to anyone who exposes another person. This may suggest that the law was intended to have a somewhat broader scope.

Of course, we have pointed to examples in which the first amendment are present, legal or factual issues for determination by a Court or jury in appropriate cases. Defendant's appeal is denied and the decision of the District Court is affirmed. And the case is remanded for further proceedings not inconsistent with this opinion. Thank you, gentlemen.

STATE OF MICHIGAN)
) SS.
COUNTY OF KENT)

I certify that this transcript, consisting of 12 pages, is a complete, true and correct transcript of the proceeding held in this case on Friday, April 30, 2002.

Dated: June 3, 2002

/s/
Shawn M. Breimayer, CSR

Notary Public, Ionia County, MI
Acting in Kent County, MI
My Commission Expires: 3-20-04

Appendix E

STATE OF MICHIGAN

IN THE DISTRICT COURT, 61ST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF MICHIGAN,

District No.: 2000-SM-1326

vs.

TIMOTHY BRUCE HUFFMAN,

Defendant.

_____/

OPINION

BY THE HONORABLE MICHAEL CHRISTENSEN, DISTRICT JUDGE

Grand Rapids, Michigan - Tuesday, August 27, 2001

APPEARANCES:

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This is Defendant's Motion to Dismiss. The Court has received several briefs from both Parties and one videotape of the event in question. No oral arguments were allowed.

Defendant's Motion to Dismiss is denied.

FACTS

Defendant was arrested for violation of the indecent exposure statute, MCL §750.335a; MSA §28.567(l), after exposing his penis on GRTV, a local public access television channel. On April 7, 2000, the Defendant was the producer for "Episode 68" which contained music and comedy skits. During this program, the Defendant exposed his penis, which was marked with facial features, and referred to as "Dick Smart" in a so-called comedy skit whereby "Dick Smart" recites jokes. No other part of Defendant's body was visible during this segment which lasted approximately three minutes.

LAW AND ARGUMENT

Defendant contends that the indecent exposure charge against him should be dismissed. In support of this contention, Defendant argues that the indecent exposure statute, MCL §750.335a; MSA §28.567(1), is not applicable to nudity in cable television programming. Defendant also argues that the statute violates his First Amendment freedom of speech right and, in the alternative, that it is facially unconstitutional because of vagueness and overbreadth. This Court concludes that the indecent exposure statute is, in fact, applicable to nudity in cable programming and that the statute is constitutional. Therefore, this Court denies Defendant's Motion to Dismiss.

Defendant argues that the indecent exposure statute was not intended to apply to nudity on television and, therefore, his conduct does not fall within the parameters of the statute. Defendant further contends that the statute only applies to in-

person conduct. However, the plain language of the statute does not make any reference to the requirement of a witness or, rather, "in-person conduct." The provision on indecent exposure states, in part, that "any person who shall knowingly make any *open or indecent exposure* of his or her person or of the person of another shall be guilty of a misdemeanor." MCL §750.335a; MSA § 28.567(1). (Emphasis added.) "Indecent exposure is the exhibition of those private parts of the person which instinctive modesty, human decency or natural self-respect requires shall be customarily kept covered in the presence of others." *People v Vronko*, 228 Mich Appropriate 649, 653; 579 NW2d 138, 140-141 (1998), citing *People v. Kratz*, 230 Mich 334, 337; 203 N.W.2d 114 (1925). (1925). Clearly, Defendant's display of his penis in such a manner as the present situation can be characterized as "indecent exposure."

In *People v Vronko*, the Court of Appeals of Michigan concluded that there was "no requirement that the defendant's exposure actually be witnessed by another person in order to constitute 'open or indecent exposure.'" *Id.* at 657. The Defendant incorrectly states case law when he states that the indecent exposure statute has been applied only to in-person conduct. In *Vronko*, the "witness" saw defendant seated in his parked vehicle with his legs bare and his hand in his crotch but did not actually see defendant's penis. The Court of Appeals' decision was consistent with the common law approach, which also did not require that the indecent exposure be observed but only that the proscribed conduct occur in a public place. *Id.* at 655-656, citing *3 Wharton's Criminal Law*, (15th ed.), § 308, p. 196-200, citing *State v Martin*, 125 Iowa 715; 101 NW 637 (1904); *Van Houten v State*, 46 NJL 16 (1884); *State v Roper*, 18 NC 208 (1835); *State v Buffano*, 5 NJ Super 255, 257; 68 A.2d 765 (1949).

Michigan Supreme Court Justice Boyle, in her concurrence *In re Certified Question*, 420 Mich 51, 63; 359 NW2d 513 (1984), concluded that "open exposure" and "indecent exposure" were separate kinds of behavior, proscribing different kinds of conduct. Justice Boyle stated that definition of "open exposure" meant that "any conduct consisting of a display of any part of the human anatomy under circumstances which create a substantial risk that someone might be offended" was prohibited. *Id.* at 63. Accordingly, "this standard would require an evaluation of the setting ... in order to determine whether anyone might reasonably have been expected to observe it and, if so, whether the person might reasonably have been expected to have been offended...." *Id.* at 63.

Applying these standards to the instant case, there is no requirement that defendant's exposure of his penis must be made in-person. Clearly, his exposure was "open" because it was reasonable to believe that someone may have been expected to observe it and thus be offended by it. Merely because Defendant's conduct appeared on a public access television channel does not provide him with immunity from the indecent exposure statute. Justice Kennedy, in his concurring opinion, in *Denver Area Educational Telecommunications Consortium, Inc. et all right v FCC, et all right*, 518 US 727; 116 S. Court 2374 (1996), stated that a public access channel, like GRTV Channel 25 in the case at bar, is a public forum. In following this characterization, Defendant's conduct, namely his exposure, occurred in a public place within the meaning of the indecent exposure statute and subsequent case law. Therefore, the indecent exposure statute is applicable to Defendant's exposure on the public access channel.

Defendant's next argument is that the indecent exposure statute, as applied to this case, is unconstitutional because it

violates his First and Fourteenth Amendment rights. Defendant contends, erroneously, that the statute is a content-based restriction upon speech. The indecent exposure statute is, however, a content-neutral regulation. The statute is aimed not at the communicative impact of the expression but rather is aimed at some evil unconnected with the speech's content, namely the "open or indecent exposure" of a person. The statute, as applied to the facts of this case, merely has an incidental suppression of expression. *United States v O'Brien*, 391 US 367; 88 S. Court 1673 (1968).

"When 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important government interest in regulating the 'nonspeech' element can justify incidental limitations." *Id.* at 377. The Supreme Court in *O'Brien* also put forth a four-part test to determine the constitutionality of a regulation on non-speech expression:

> A government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

O'Brien, 391 US 367, 377.

The statute promotes an important governmental interest: the protection of public order and morality. *See Barnes v Glen Theatre Inc.*, 501 US 560; 111 S. Court 2456 (1991), where the United States Supreme Court upheld a ban on nude dancing stating that the government's interest in protecting order and morality outweighed the slight infringement on the

dancers' free expression. The indecent exposure statute, as stated above, was not designed to impinge upon a person's conduct. Expressive conduct, not pure speech is regulated, and the statute's application to conduct protected by the First Amendment is, at most, minimal. *People v Wilson*, 95 Mich Appropriate 440; 291 NW2d 73 (1980); *Plymouth Township v Hancock*, 236 Mich Appropriate 197; 600 NW2d 380 (1999). As stated above, the statute is not aimed at suppressing one's first Amendment freedom of speech. Instead, the statute is aimed at the prevention of the "exhibition of private parts of the person which instinctive modesty, human decency or natural self-respect requires shall be customarily kept covered in the presence of others." *Vronko*, 228 Mich Appropriate 649 at 653.

The statute has nothing to do with the content of Defendant's or anyone else's speech. The Defendant has been not been punished because of the ideas or the information contained in his comedy skit, but rather for the conduct - the "open or indecent exposure" of his penis to the public. "The First Amendment does not protect nonsymbolic, nonverbal conduct which has no speech element" and hence Defendant's exposure of his penis is not entitled to First Amendment protection. *People v Wilson*, 95 Mich Appropriate 440, 74, 291 NW2d 73 (1980). If an anti-war activist breaks a window of an induction center protesting against the draft, a state should be able to punish said activist for this crime because although the act may be expressive, the harm which the state seeks to prevent does not flow from the content of the message. Simply stated, Defendant is not prohibited from performing his "comedy skit" in the future, but is, however, regulated in the manner in which he performs that routine.

Defendant's analogy of the case at bar to the ordinance in *Erznoznik v Jacksonville*, 422 US 205; 95 S. Court 2268

(1975), and the network broadcast of *Schindler's List* is misguided. The municipal ordinance in *Erznoznik* made it a public nuisance and a punishable offense for a drive-in movie theater to show films containing nudity when the movie screen was visible from a public street. The United States Supreme Court held that the ordinance was unconstitutional as a *content-based* restriction on the freedom of speech, and that the ordinance discriminated among movies solely on the basis of content. *Erznoznik*, 422 US 205, 208-212. (Emphasis added.)

The Supreme Court went on to state further that "scenes of nudity in a movie, like pictures of nude persons in a book, must be considered as a part of the whole work. In this respect such nudity is distinguishable from the kind of public nudity traditionally subject to indecent-exposure laws." *Erznoznik*, 422 US 205, 211, n7, citing *Miller v California*, 413 US 15; 94 S. Court 2750 (1973). Defendant's analogy of his present situation to *Schindler's List*, which did contain full frontal nudity of both men and women in its broadcast, is weak. *Schindler's List*, is a historic documentation which shows the nudity of men and women in the context of their lives in death camps. Schindler's List also contained a warning at the beginning of the network broadcast warning viewers of the nudity. On the contrary, Defendant's program contained no such warning of nudity and consisted of three minutes of a prolonged, up-close focus on the genitals, which had a face drawn on, and this is all the viewer was able to see. A voice in the background told jokes and stories, all the while making it seem as though the penis was doing the talking. Defendant's attempt to justify his indecent exposure on a public access cable television channel as protected expression is without merit and, therefore, this Court finds that the Michigan indecent exposure statute does not violate Defendant's First or Fourteenth Amendment rights.

Defendant's next argument is that the Michigan indecent exposure statute is unconstitutional on its face because of overbreadth and vagueness. More specifically, Defendant argues that the statute applies, in general, to speech that is constitutionally protected, that it fails to give adequate notice of the specific conduct that is proscribed, and that it permits arbitrary enforcement by government officials. *Wilson*, 95 Mich Appropriate 440 at 443.

A. OVERBREADTH

A statute is overbroad if, in addition to proscribing activities, which may be constitutionally prohibited, it also encompasses within its coverage conduct or speech that is constitutionally protected. *Thornill v Alabama*, 310 US 88 (1940). Generally, a person whose conduct can constitutionally be regulated by a statute does not have standing to contest the facial validity of that statute. "Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." *Broadrick v Oklahoma*, 413 US 610, 610, 93 S. Court 2908, 37 L Ed 2d 830 (1973). However, the Court in *Broadrick* went on to state that an exception to this general principle of standing existed in order to allow a challenge to a statute when the overbreadth impinges upon First Amendment protections. *Id.* There are some guidelines, however. The Court distinguished between statutes primarily regulating conduct and those directly governing speech. In those cases of statutes governing conduct, the Court believed that for facial invalidation to be appropriate, "the overbreadth of a statute must not only be real, but *substantial* as well, judged in relation to the statute's plainly legitimate sweep." *Id.* at 614-615. The overbreadth must substantially infringe

upon First Amendment protections in such a way as to have a chilling effect on those rights.

In a similar case that involved challenges to the Michigan indecent exposure statue, the Court of Appeals stated that where "[expressive conduct, not pure speech, is regulated and the statute's application to conduct protected by the First Amendment is, at most, minimal," there was no substantial overbreadth to invalidate the indecent exposure statute. *Wilson*, 95 Mich Appropriate 440 at 445. Therefore, this Court, in keeping with *Wilson*, concludes that there is no substantial overbreadth.

B. VAGUENESS

A statute is unconstitutionally vague if "(1) it is overbroad, impinging on First Amendment freedoms, or (2) it does not provide fair notice of the conduct proscribed, or (3) it is so indefinite that it confers unstructured or unlimited discretion on the trier of fact to determine whether the offense has been committed." *People v Murphy*, 203 Mich Appropriate 738, 747; 513 NW2d 451 (1994), citing *Woll v Attorney. General*, 409 Mich 500, 533; 297 NW2d 578 (1980), on remand, 116 Mich Appropriate 791; 323 NW2d 560 (1982). For the above-stated reasons, this Court concludes that Defendant's First Amendment rights have not been implicated by the indecent exposure statute. Therefore, we examine the vagueness challenge by applying the indecent exposure statute to the particular facts of this case. See *People v Cavaiani*, 172 Mich Appropriate 706; 432 NW2d 409 (1988); *People v Lynch*, 410 Mich 343; 301 NW2d 796 (1981). Defendant argues that the language of the statute, especially the terms "open" and "indecent" are not clear enough so as to provide him with notice of what is deemed proscribed conduct.

When making a vagueness determination, "a statute is not vague if the meaning of the words in controversy can be

fairly ascertained by reference to judicial determinations, the common law, dictionaries, treatises, or their generally accepted meaning." *Vronko*, 228 Mich Appropriate at 653, citing *Cavaiani*, 172 Mich Appropriate at 714. In *Vronko*, the Court of Appeals examined a similar vagueness challenge to the indecent exposure statute. In that case, the Court relied upon dictionary definitions of "open" and "indecent exposure to assist in its determination. "Open" is defined as "exposed to general view or knowledge," "having no protective covering," and "to disclose or expose to view." *Vronko*, 228 Mich Appropriate at 653-664, citing Webster's New Collegiate Dictionary (1977). "Indecent exposure" is defined as an "intentional exposure of part of one's body (as the genitals) in a place where such exposure is likely to be an offense against the generally accepted standards of decency in a community." *Id.* Given these definitions, it is clear that the indecent exposure statute provided fair notice to Defendant that his conduct was proscribed, despite the fact that it occurred on the public access channel, and that it did not confer upon the trier of fact unstructured and unlimited discretion to determine if a crime had, in fact, been committed. Therefore, in keeping with precedent, the indecent exposure statute is not unconstitutionally vague as applied to Defendant.

Defendant's final argument is that the Michigan indecent exposure statute denies him equal protection. As stated above, the statute does not impinge upon Defendant's freedom of speech. Therefore, the statute is not subject to strict scrutiny as Defendant submits. Defendant also does not suggest that he is a member of a recognized "suspect class" which would cause the statute to be examined under a stricter scrutiny. His argument that the "impermissible classification scheme" consists of the GRTV program versus those programs that have full frontal nudity on cable and in films does not come under the umbrella of a protected class

like race, alienage, etc. Nor does Defendant provide evidence that the statute has been applied in a discriminatory manner. Therefore, Defendant's equal protection claim must also fail.

For the above-stated reasons, Defendant's Motion to Dismiss is hereby denied.

August 28, 2001 /s/
J. Michael Christensen

Appendix F

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Michigan Compiled Laws

750.335a. Indecent exposure (2000)

Sec. 335a. Any person who shall knowingly make any open or indecent exposure of his or her person or of the person of another shall be guilty of a misdemeanor, punishable by imprisonment in the county jail for not more than 1 year, or by a fine of not more than $500.00, or if such person was at the time of the said offense a sexually delinquent person, may be punishable by imprisonment in the state prison for an indeterminate term, the minimum of which shall be 1 day and the maximum of which shall be life: Provided, That any other

provision of any other statute notwithstanding, said offense shall be triable only in a court of record.

* * * *

(2)

No. 05-1449

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SUPREME COURT, U.S.

In The
Supreme Court of the United States

TIMOTHY B. HUFFMAN,

Petitioner,

v.

THE PEOPLE OF THE STATE OF MICHIGAN,

Respondent.

On Petition For Writ Of Certiorari
To The Court Of Appeals Of Michigan

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a statute prohibiting indecent exposure be applied to Petitioner, who created a film that consisted of his exposed genitals and then showed the film on Cable Access TV, a forum designed for public viewing?

2. Did Petitioner have fair notice that it is illegal to expose one's genitals in an open and indecent manner?

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STATEMENT OF THE CASE

Petitioner was convicted of a violation of Michigan's indecent exposure statute, Michigan Complied Laws [MCL] 750.335a. The charges concern Petitioner's display, on a public access television program, of a skit. The taped skit consisted of a scene of a man's genitals, with a face drawn on the penis. Dialogue is from a purported comedian named "Dick Smart," and consists of double entendre jokes.

Trial was held in the 61st District Court for the City of Grand Rapids. Maria Allen testified that she was home on April 7, 2000, looking through various television stations, when she came upon Channel 26, the Public Access television station. She saw the skit in question. She saw a "blue-white type of handkerchief that sometimes people wear in their hair, and in front of it was genitals and a penis, and on the penis, there was a face drawn on it like a – to make it look like a face" (Trial, pp 23-24). "It looked like it was like a puppet show but with a man's private parts," and "the whole screen was pretty much the handkerchief and the private parts on T.V." (Trial, p 24). She called the cable station on Monday morning to complain about what she had seen (Trial, p 25).

The station on which the program is aired, GRTV, is "a place where citizens have a chance to put on their own T.V. programs" (Trial, p 29). "It's sort of a First Amendment forum, so in other words, no matter what your point of view, you can bring a tape to GRTV" (Trial, p 40). The tapes are not viewed before airing (Trial, p 53). There are about 46,000 cable subscribers in Grand Rapids, all of whom would have access to Channel 26, and some people

outside the city would also have access to the channel (Trial, pp 55-57).

Petitioner had told a friend that he had developed a character named "Dick Smart" (Trial, p 62), and that he had drawn a face on his penis, draped himself, and that he had the character make comments with double meanings (Trial, p 65).

Petitioner had called the grandfather of his children on the day the "Dick Smart" routine was shown, and told him "not to let the boys watch it, because it's more for the adults, and he just – just don't let 'em watch it" (Trial, p 76).

Petitioner voluntarily surrendered himself for arrest. A copy of the videotape of the program was found in his home (Trial, p 85). As he was being processed for the arrest, Petitioner said "that he was hoping that this would get him on the Howard Stern show" (Trial, p 85).

Petitioner appealed his conviction to the Kent County Circuit Court, which affirmed in an opinion and order dated November 3, 2003. The Court of Appeals granted Petitioner's leave to appeal. The Court of Appeals then affirmed the defendant's convictions in a published opinion dated May 10, 2005. The Michigan Supreme Court denied further review in an order dated January 12, 2006.

REASONS FOR DENYING THE WRIT

-I-

PETITIONER CREATED A FILM THAT CONSISTED ENTIRELY OF HIS GENITALS AND A VOICE-OVER SOUND TRACK. HE PLACED THAT FILM ON CABLE ACCESS TELEVISION. HIS ACTION WAS AN INDECENT EXPOSURE IN AN OPEN AND PUBLIC MANNER, AND HIS PROSECUTION WAS CONSTITUTIONAL.

The facts of this case are undisputed. Petitioner created a film of his genitals, and distributed that film through Public Access television where it was available to be seen by an unsuspecting public. There is no doubt that Petitioner's conduct would be the proper subject of an indecent exposure prosecution under Michigan law had he chosen to conduct his skit in a public square. Should the result be different because Petitioner used Public Access Television to present his skit over a wider area? We submit that the answer is no.

The Michigan indecent exposure statute, MCL 750.335a, states:

> Any person who shall knowingly make any open or indecent exposure of his or her person or of the person of another shall be guilty of a misdemeanor, punishable by imprisonment in the county jail for not more than 1 year, or by a fine of not more than $500.00, or if such person was at the time of the said offense a sexually delinquent person, may be punishable by imprisonment in the state prison for an indeterminate term, the minimum of which shall be 1 day and the maximum of which shall be life: Provided, that any other provision of any other statute

> notwithstanding, said offense shall be triable only in a court of record.

Petitioner was not charged as a sexually delinquent person. The charge was that he made an "open or indecent exposure of his or her person or of the person of another." From evidence presented at trial, it is clear that the film was of the Petitioner himself. The issue is whether Petitioner's act, filming his exposed genitals, with the camera solely on his genitals for the entire film, and then displaying this film on public access television, was properly the subject of Michigan's indecent exposure statute.

The indecent exposure statute prohibits "any open or indecent exposure."[1] It does not prohibit only live exposures. The statute has been generally applied to exposures in the public, but that is mainly because most people who expose themselves do so in a live exposure, not in the imaginative manner in which Petitioner chose.[2]

---

[1] The statute does not, however, require that anyone actually observe the exposure. *People v Vronko*, 228 Mich App 649, 655; 579 NW2d 138 (1998).

[2] Petitioner refers to his prosecution as "completely unprecedented" (Petition for Writ of Certiorari, p 9). It is certainly not unprecedented, nor the least bit controversial, to hold that a man may not expose his genitals in an open manner. If there are no prosecutions of other people who have prepared similar programs and then aired those programs over Public Access Television, it is likely because no other person has come up with this way of violating the indecent exposure statute. Petitioner's "Dick Smart" routine was more than simple nudity; it was a film that showed a man's genitals and (except for a handkerchief and markings on the penis), nothing else. Petitioner's suggestion that the "unprecedented" nature of the prosecution precludes criminal liability for his actions is somewhat akin to arguing that a person who carved a zucchini to resemble a gun could not be convicted of robbery simply because no other reported case ever showed a defendant who accomplished a robbery the same way.

Petitioner compares his exposure of himself to nudity contained in films, magazines, books, or television (i.e., network or cable) programming. Petitioner has throughout this litigation compared his exposure to a network broadcast of "Schindler's List," a movie containing scenes of frontally nude actors depicting Jewish concentration camp prisoners. Petitioner contends that because his exposure, like that of the actors in "Schindler's List," is mixed (purportedly) with constitutionally protected communication, this prosecution prohibits speech. He accordingly raises the specter that, if his conviction is allowed to stand, producers of all sorts of cable television programs will be prosecuted for presenting nudity on programs.

Most cases addressing nudity, or sexually explicit scenes, in a movie, have done so in the context of an allegation that the movie was obscene. This Court has indicated that "[s]cenes of nudity in a movie, like pictures of nude persons in a book, must be considered as part of the whole work." *Erznoznik v Jacksonville*, 422 US 205, 211, n7; 95 S Ct 2268; 45 L Ed 2d 125 (1975), citing *Miller v California*, 413 US 15, 24; 94 S Ct 2750; 37 L Ed 2d 419 (1973). "In this respect such nudity is distinguishable from the kind of public nudity traditionally subject to indecent-exposure laws." *Erznoznik*, 422 US at 211, n 7. The issue in *Erznoznik* involved a city ordinance that prohibited the showing of films containing nudity at a drive-in theater when the theater's screen was visible from a public street or place. This Court held that this ordinance was unconstitutional. But as the Court noted, the problem with the ordinance was that it addressed only those movies containing nudity and singled them out in a manner that prevented those who would like to see the movies from seeing them at a drive-in theater. It is true that the Court said

"the offended viewer readily can avert his eyes" from the screen where nudity was being shown, *Id.*, 422 US at 212, but this comment was made in the context of "a motion picture [that] must be considered as a whole, and not as isolated fragments or scenes of nudity." *Id.* And, of course, drive-in theaters were never viewed as public fora where a person could simply express views.

"Schindler's List" has a total running time of 197 minutes. Petitioner attached to his brief in the Kent County Circuit Court an affidavit that indicated "Schindler's List" has two scenes containing nude actors, which are two to three minutes in combined length. "Dick Smart," in contrast, is a film clip that contains only one scene: a man's exposed penis and scrotum. The rest of the man is not shown. It can hardly be said that the "nudity" in question was an "isolated fragment." And unlike "Schindler's List," or the movie in question in *Erznoznik*, "Dick Smart" was presented on Public Access Television where one presumably would not expect to be confronted with the sort of image presented.

It cannot be overstated that this case had nothing to do with Petitioner exercising his free speech rights. Michigan has recognized that its indecent exposure statute regulates conduct, an "open or indecent exposure." The statute was not designed to prohibit speech. See *People v Wilson,* 95 Mich App 440, 445; 291 NW2d 73 (1980). It applies regardless of whether a message is being conveyed, and "[i]t reflects no bias, censorship or preference for a particular viewpoint over another." *Gannett Co v Troy*, 156 Mich App 126, 136; 401 NW2d 33 (1986). In this sense, the statute is content-neutral. See *Plymouth Twp v Hancock*, 236 Mich App 197, 203, n3; 600 NW2d 380 (1999) (declaring ordinance content-neutral if it does not attempt to

regulate speech on the basis of message). The expression or viewpoint of the indecently exposed individual is of no significance.

Petitioner maintains that the statute does not reach conduct that occurs on television. But it must be remembered that the exposure in this case occurred on Public Access Television. Public access channels, unlike restricted, premium channels (for example, the Playboy Channel), are accessible by all cable viewers. Such channels are required for general public use, see 47 USC § 532. The purpose of such channels is "to promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with growth and development of cable systems." 47 USC § 532(a). Those channels permit individuals to produce programs that they can submit to the public, a sort of electronic Hyde Park. A cable operator is not allowed to exercise editorial control over the views expressed in such programs, but Congress has recognized that a cable operator may refuse to show a program that lacks constitutional protection:

> A cable operator shall not exercise any editorial control over any video programming provided pursuant to this section, or in any other way consider the content of such programming, except that a cable operator may refuse to transmit any leased access program or portion of a leased access program which contains obscenity, indecency, or nudity and may consider such content to the minimum extent necessary to establish a reasonable price for the commercial use of designated channel capacity by an unaffiliated person.

47 USC § 532(c)(2). A casual television viewer does not reasonably expect to encounter an indecently exposed person on Public Access Television. In this sense, the viewer is no different than someone who encounters an indecently exposed person on the street. Cf. *Denver Area Educ Telecomms Consortium, Inc v FCC*, 518 US 727; 116 S Ct 2374; 135 L Ed 2d 888 (1996) (plurality opinion) (Kennedy, concurring in judgment in part, characterizing public access channels as public fora, and noting "[p]ublic fora do not have to be physical gathering places"). Here, Petitioner exposed his penis in a setting where others were likely to observe the exposure, so the statute constitutionally applies.

The issue is not precisely whether public access television constitutes a "public forum." Cases addressing that issue typically have done so in the context of whether any restrictions can be placed on the content of programs. For example, in *Alliance for Community Media v FCC*, 56 F3d 105, 123 (DC Cir, 1995), the Court said that Public Access cable stations were not "so dedicated to the public that the First Amendment confers a right on the user to be free from any control by the owner of the cable system." In other words, GRTV could constitutionally prohibit the airing of a film such as "Dick Smart" consistent with the First Amendment – the same way that the government could prohibit the exhibition of one's genitals on a public street corner, even where a person would be protected by the First Amendment to engage in political activities.

Public Access Television is a different creature than ordinary cable television. Its central purpose is to permit the public to air programs. The public should be held to the same standard for this sort of program as for any

conduct that occurs live in public. You can say whatever you want; but you can't expose yourself.

This Court has noted that, of all forms of communication, broadcasting has "the most limited First Amendment protection." *FCC v Pacifica Foundation*, 438 US 726, 748; 98 S Ct 3026; 57 L Ed 2d 1073 (1978). The Court observed that "the broadcast media have established a uniquely pervasive presence in the lives of all Americans," and that "[p]atently offensive, indecent material . . . confronts the citizen, not only in public, but also in the privacy of the home," usually without sufficient prior warning to allow the recipient to avoid it. *Id.*[3] It would be one thing for a state statute to prohibit the airing of a particular point of view; it is quite another thing for a state statute to prohibit indecent exposure, and to apply the state's indecent exposure statute to a presentation like Petitioner's "Dick Smart" routine on Cable Access Television.

Denver Area, supra, held that a provision of the Cable Television Consumer Protection Act permitting cable television operators to prohibit programming which contained "patently offensive" sex-related material on leased access channels was constitutional, but that a provision which required cable operators who decide to carry such programming to segregate the programs on a single channel and to block access unless written consent

[3] Petitioner suggests that the Michigan Court of Appeals misapplied *FCC v Pacifica Foundation* in upholding a criminal conviction. But the Michigan Court of Appeals only cited *FCC v Pacifica Foundation* for the proposition that there are limits to First Amendment protection for broadcast media, and that the First Amendment does not bar prosecution for conduct that can properly be reached by the criminal law.

was obtained from subscribers, and which permitted cable operators to prohibit such programming on public, educations, or governmental use challenges, violated the First Amendment. The Court found that the need to protect children from exposure to "patently offensive sex-related materials," *id.*, 518 US at 743, justified the provision that permitted prohibition of certain programming. The instant case involves a crime committed by a man who used a Public Access Television channel as the means of perpetrating this crime, so *Denver Area* is not directly on point with the issue in the instant case; but it does support that a blanket prohibition against certain conduct – for example, exposing oneself in an open and indecent manner – is constitutionally permissible.

Petitioner claims that Fundamental First Amendment values are at stake. But one cannot expose oneself to an unsuspecting public in hopes of eliciting laughter and then use the First Amendment as a shield from criminal prosecution. Under Petitioner's logic, he can evade prosecution by combining the proscribable conduct (open or indecent exposure) with protected expression (or speech), whether he appears on public access television or stands in the middle of the Calder Plaza in downtown Grand Rapids, Michigan.

While a routine comedy skit intended to entertain others might, in a particular context, enjoy First Amendment protection, Petitioner used his penis (nudity or nonspeech) and words (narration or speech) to express a "comedic" message. In effect, this is expressive communication that is subject to less stringent (intermediate) First Amendment scrutiny:

> [W]hen "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. . . . [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

United States v O'Brien, 391 US 367, 377; 88 S Ct 1673; 20 L Ed 2d 672 (1968).

Michigan's indecent exposure statute is not designed to preclude pure speech or expression. The statute as applied to Petitioner does not preclude the expression of any ideas. It simply precludes a particular form of conduct: exposing his genitals (or the genitals of another). Such a prohibition is within the constitutional power of the government. Public indecency statutes, similar to the one in issue, promote important governmental interests. See *Barnes v Glen Theatre, Inc*, 501 US 560; 111 S Ct 2456; 115 L Ed 2d 504 (1991) (plurality opinion) (Rehnquist, C.J., joined by two justices, noting governmental interest in protecting public order and morality); (Souter, J., concurring in judgment, noting governmental interest in curtailing undesirable "secondary effects" of adult entertainment (nude dancing)). The statutory prohibition here is precisely tailored to effectuate an important governmental interest in maintaining public order, for instance.

In *Clark v Community for Creative Non-Violence*, 468 US 288; 104 S Ct 3065; 82 L Ed 2d 221 (1984), this Court upheld a National Park Service regulation that prohibited people from sleeping in certain parks. A group wanted to sleep in Lafayette Park and the Mall in Washington, D.C. The group said that its purpose was to convey a message about homelessness, and that the regulation interfered with their First Amendment rights. The Court found that the regulation was constitutional, that the Park Service had the right to establish reasonable time and place regulations, even assuming that sleeping were considered expressive conduct. The right to prevent exposure of one's genitals is at least as strong a governmental interest as prohibiting people from sleeping in parks that are not designed as campsites.

Much of the Petitioner's argument concerns the power of the government to restrict certain types of programming. But, it must be reiterated, the program in question here differs from that discussed in other cases in two particulars: first, it was not merely nudity, but a film that consisted entirely of a close-up shot of a man's genitals; and second, it occurred on Public Access Television, not a premium cable service where viewers presumably are aware of the programming available.

Petitioner relies on *United States v Playboy Entertainment Group, Inc*, 529 US 803; 120 S Ct 1878; 146 L Ed 2d 865 (2000). *Playboy* involved a First Amendment challenge to a government regulation of adult programming on cable television. The regulation (civil) restricted the airing of "sexually explicit adult programming or other programming that is indecent" on cable television; the adult programming had to be fully scrambled or shown during hours when children were less likely to see images

filtering through cable transmission. Playboy challenged the regulation, arguing that it impermissibly restricted adult programming. While this Court recognized a compelling governmental interest in protecting children from indecent materials, it concluded that the least restrictive means were not used to further the interest and struck down the law as a content-based restriction of speech. Here, however, Respondent is not defending a regulation that permits programming but restricts its time and place; we instead are dealing with a far simpler issue, a statute that contains the (one would hope) noncontroversial provision that you cannot expose yourself in an open manner, and that presenting a film that consists of nothing but penis and scrotum on Public Access Television is indecent exposure by any definition.

Denver Area Educ Telecomms Consortium, Inc v FCC, supra, is likewise uncontrolling. *Denver Area*, like *Playboy Entertainment*, involved a civil regulation of cable programming – a content-based restriction.[4] Michigan's indecent exposure statute does not attempt to regulate cable programming insofar as speech is concerned, particularly on Public Access Television. By enforcing the statute, Respondent was protecting the public in general, here unsuspecting public access television viewers,[5] from

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[4] In *Denver Area*, this Court, in pertinent part, invalidated a section of the Cable Television Consumer Protection and Competition Act of 1992 that allowed cable system operators, at their option, to ban indecent programming on public access channels. The government, like in *Playboy Entertainment*, asserted a compelling interest in protecting children, but the Court ruled, in part, that the regulation was not appropriately tailored to that end.

[5] Petitioner argued in the Michigan Courts that subscribers can block programming on public access channels, but there is no record evidence that subscribers were advised of this right.

encountering indecently exposed individuals such as Petitioner. Respondent did not seek to restrict Petitioner's access to Public Access Television, and we do not seek to restrict any point of view he may wish to express.

Petitioner has consistently taken the position that this prosecution was an improper attempt to evaluate the artistic merit of his program. As noted previously, the issue is Petitioner's conduct, not his expression. Petitioner was not prosecuted for bad comedy. He was prosecuted for exposing himself on Public Access Television, in a place where he knew he would be seen, and in a manner that he knew would be offensive.

The First Amendment requires that we tolerate much that is offensive. Subjective views of indecency are an insufficient basis to preclude the exercise of free speech. Even vulgar comments are protected, see *Cohen v California*, 403 US 15; 91 S Ct 1780; 29 L Ed 2d 284 (1971) (a jacket that contained words suggesting sexual intercourse with the selective service system held constitutionally protected speech). Some view this as a healthy and robust sign of a free society; others view it as a coarsening of society. Both views are to some extent correct.

But can the First Amendment be used as a shield to protect any and all conduct? Are there no actions, no matter how minimal, that the government can take against indecent conduct? If a state can constitutionally prohibit the indecent exposure of a person – which we think the state clearly can do – and if Petitioner's conduct is viewed as open conduct under Michigan's indecent exposure statute, his conviction was constitutional. What restrictions can be placed in other contexts on nudity or sexually explicit programming is an interesting intellectual question,

but it isn't apropos to the instant case at all. This matter is far simpler than that. Petitioner filmed his exposed genitals, and put that film on public access television. The First Amendment permits that conduct no more than it permits Petitioner to expose himself in on the steps of the United States Supreme Court. Respondent submits that the Michigan courts properly ruled that the defendant's conduct was subject to Michigan's indecent exposure statute, and that this Court should decline to grant the writ of certiorari.

-II-

MICHIGAN'S INDECENT EXPOSURE STATUTE GIVES FAIR NOTICE THAT IT IS IMPROPER TO EXPOSE ONESELF IN AN OPEN AND INDECENT MANNER, NO MATTER THE FORUM IN WHICH A PERSON CHOOSES TO ENGAGE IN THE FORBIDDEN CONDUCT.

Petitioner alternatively argues that Michigan's indecent exposure law is unconstitutionally vague as applied to his conduct, because it did not give fair notice to Petitioner that he could not expose himself on a Public Access television channel.

Petitioner is not alleging that the indecent exposure statute itself is vague. He does not suggest, for example, that he lacked notice that one cannot expose genitals on a city street. The defendant's main argument is that, since no one before him ever thought of violating the indecent exposure statute in the manner he did, perforce he cannot be prosecuted for his conduct.

This Court has had many occasions to address the "fair notice" issue. In *Grayned v City of Rockford*, 408 US

104, 108-189; 92 S Ct 2294, 2298-2299; 33 L Ed 2d 222 (1972), the Court observed:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attended dangers of arbitrary and discriminatory application. Third, but related, where a vague statute 'abut(s) upon sensitive areas of basic First Amendment freedoms," it 'operates to inhibit the exercise of those freedoms.' Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked. (internal cites omitted)

The Court in *Grayned v City of Rockford* rejected a claim that an anti-noise ordinance, forbidding "the making of any noise or diversion which disturbs or tends to disturb the peace or good order" of a school or class, was unconstitutionally vague. The Court recognized that finding the appropriate meaning of the words of the ordinance was difficult, but also observed that "[c]ondemned to the use of

words, we can never expect mathematical certainty from our language." *Id.*, p 110, 92 S Ct at 2300.[6]

Petitioner certainly knew that he could not expose himself. He knew, or at least is reasonably charged with knowing, that he had no right to present an indecent exposure of himself or anyone else on Public Access Television. He certainly knew that his conduct was inappropriate (going so far as warning the grandfather of his children not to allow the children to watch the program). While legislative bodies are charged with making laws sufficiently clear to advise the public what is illegal, they cannot be charged with the impossible burden of anticipating every new and imaginative way that a statute can be violated.

Petitioner cites *Rabe v Washington*, 405 US 313; 92 S Ct 993; 31 L Ed 2d 258 (1972), where this Court struck down a conviction for exhibiting obscene motion pictures. But the problem in that case was that the statute did not give notice that material would be obscene in one context and not in another. Petitioner in this case was not charged with obscenity. He was charged with a crime based on his conduct, not his expression. Application of Michigan's indecent exposure statute obviously depends on location; it is perfectly permissible to be naked while showering in the privacy of one's own home, but not while strolling down the street. But the indecent exposure statute is limited to open or indecent exposures. The defendant deliberately exposed himself in a manner that he knew would be seen

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[6] "Words strain, / Crack and sometimes break, under the burden, / Under the tension, slip, slide, perish, / Decay with imprecision, will not stay in place, / Will not stay still." T.S. Eliot, Four Quartets, "Burnt Norton," Section V.

by a wide variety of people with no warning of what would be seen. The indecent exposure statute gave him fair warning that his conduct could subject him to criminal liability. His argument to the contrary presents no basis on which this Court should grant review.

CONCLUSION

Respondent prays that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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No. 05-1449

IN THE

Supreme Court of the United States

TIMOTHY B. HUFFMAN,
Petitioner,

v.

THE PEOPLE OF THE STATE OF MICHIGAN,
Respondent.

On Petition for a Writ of Certiorari to the Michigan Court of Appeals

REPLY BRIEF

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Nothing in the State's Opposition refutes that Petitioner's conviction under the Michigan indecent exposure statute raises significant and novel First Amendment questions warranting this Court's review. To the contrary, by adopting the confused reasoning of the Michigan Court of Appeals, the State's brief serves merely to underscore why this Court's involvement – by either plenary review or summary reversal – is needed. Even if the Court declines review on First Amendment grounds, the Court should summarily reverse Petitioner's conviction because he lacked fair warning that his actions were within the scope of Michigan's indecent exposure statute.

I. The State's Opposition Underscores The Need For This Court's Review To Resolve Significant First Amendment Questions.

The central thrust of the State's Opposition – which denies neither the far-reaching chilling effect of the Court of Appeals' opinion nor the dangerous consequences of its logic for important First Amendment principles – is simply to repeat the Michigan Court of Appeals' flawed logic. That line of reasoning rests upon a mischaracterization of the activity for which Petitioner was convicted and a fundamental miscomprehension of the distinction between "content-based" and "content-neutral" application of restrictions on expression. Pet. at 15-17. The reasoning also conflicts with the Court's application of searching scrutiny to governmental attempts to restrict sexually explicit content that is not obscene, whether on cable television, *see United States v. Playboy Entertainment Group*, 529 U.S. 803, 814 (2000); *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 756 (1996), or in other media, *see, e.g., Reno v. ACLU*, 521 U.S. 844, 874-76 (1997); *Sable Communications of California, Inc. v. FCC*,

492 U.S. 115, 126 (1989); *see also Erznoznick v. City of Jacksonville*, 422 U.S. 205, 212-14 (1975).

The State tries to distinguish this case from the Court's prior cases "addressing nudity, or sexually explicit scenes, in a movie," by arguing that those cases involved "an allegation that the movie was obscene." Opp. at 5. But that is precisely the point. Acceptance of the Court of Appeals' notion that the "expressive conduct" rationale of cases such as *United States v. O'Brien*, 391 U.S. 367 (1968), *City of Erie v. Pap's AM*, 529 U.S. 277 (2000) and *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), extends also to *images* of nudity would circumvent entirely any need to prove that a movie, television program, or book was obscene in order to criminalize its distribution or display. Under that theory, virtually every attempt to restrict or punish the expression of indecent content could be recast as punishing the actors for the "conduct" of appearing nude in such films, or of the directors, station operators, or theater owners for the "conduct" of "exposing the persons" of the actors.[1] This Court should clarify that the logic of its nude dancing cases cannot be expanded in this manner.

The State argues nonetheless that application of the public indecency statute to Petitioner's program is justified because it was aired on a public access channel. *See* Opp. at 6-10. But neither Petitioner's conviction nor the constitutional principles at stake in this case turn in any way on the type of the cable television channel on which his program was shown. The Court of Appeals' reasoning – that

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[1] Although the State tries to make much of its claim that "it is clear that the film was of the Petitioner himself," Opp. at 4, Petitioner's conviction did not turn on that fact. Mich. Comp. Laws § 750.335a, under which Petitioner was convicted, also criminalizes exposing "the person of another," and the jury was in fact instructed that it could also convict Petitioner if the cable program at issue exposed the genitals "of another." Trial Tr. at 145-46.

the display of televised images of nudity is "conduct" entitled only to the lesser degree of constitutional protection in *O'Brien* and its progeny, *see* Pet. App. 14a – applies irrespective of the medium by which the images are transmitted. Nothing limits this flawed principle to public access television channels as opposed to privately-run cable channels. Indeed, the rationale of *Barnes* and *Pap's*, expressly adopted by the Court of Appeals, applies even where the audience is fully consenting. *See Barnes*, 501 U.S. at 566 (plurality) (applying public nudity statute to club where only consenting adult viewers were present); *see also id.* at 575 (Scalia, J., concurring in the judgment); *Pap's*, 529 U.S. at 295-96 (plurality). Thus, the Court of Appeals' logic, if accepted, would apply equally to the display of films in a movie theater, where the audience is willing and fully on notice of what sort of content to expect.

The State's claim that the Constitution permits a "blanket prohibition" on displaying nudity on public access channels, Opp. at 10, is also entirely at odds with this Court's decision in *Denver Area*, which struck down a federal regulation that imposed limits on "patently offensive" programming on public access channels. 518 U.S. at 760-66. And this case simply does not present the question of whether individual public access channel operators might properly fashion rules restricting the display of nude or indecent images on their channels to certain times of day – although *Playboy* holds that such time restrictions would need to satisfy strict scrutiny. 529 U.S. at 814.[2] Instead, this case involves a total criminal ban on the televised display of nude images on *any* television channel – cable, broadcast, public access, or otherwise – irrespective of the time of the broadcast, so long

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[2] In any event, Petitioner's program was cablecast late at night, consistent with GRTV's policies. *See* Pet. at 2; Br. Amici Curiae Alliance for Comm'ncs Democracy at 5 n.4.

as someone might find the images "offensive." This the First Amendment does not permit.

The State observes that Petitioner's program is different from films like *Schindler's List* in which scenes of nudity are part of a longer work and on this basis downplays the threat posed by the decision below to First Amendment freedoms. *See* Opp. at 5-6. Contrary to the State's assertion, however, the nudity for which Petitioner was convicted was part of a longer television program and cannot be distinguished on that basis. More importantly, the First Amendment questions raised by this case are no less significant because Petitioner's program may be cruder than other films or programs also containing nudity. This Court has repeatedly insisted that outside the narrow realm of obscenity, the ability of speech to shock or offend is not a basis for banning it. *See, e.g.*, *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245 (2002) ("It is also well established that speech may not be prohibited because it concerns subjects offending our sensibilities."); *Playboy*, 529 U.S. at 826 ("The history of the law of free expression is one of vindication in cases involving speech that many citizens may find shabby, offensive, or even ugly."); *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 701 (1977); *Cohen v. California*, 403 U.S. 15, 25 (1971); *Winters v. New York*, 333 U.S. 507, 510 (1948). It vindicates rather than degrades free speech principles to say that they apply with equal force to Petitioner's program as well as notable films. *See Playboy*, 529 U.S. at 818 ("The Constitution exists precisely so that opinions and judgments, including esthetic and moral judgments about art and literature, can be formed, tested, and expressed."); *see also Cohen*, 403 U.S. at 25.

II. If The Court Does Not Grant Plenary Review, It Should Summarily Reverse On Due Process Grounds.

In response to Petitioner's argument that summary reversal is warranted because he had no "fair warning" that he could be subject to criminal penalties for the cablecast of his program, the State cites to the void-for-vagueness standard set forth in *Grayned v. City of Rockford*, 408 U.S. 104 (1972). Opp. at 15-16. But the void-for-vagueness doctrine is not at issue here. Instead, Petitioner is challenging the Court of Appeals' unprecedented and unforeseeable construction of Michigan's public indecency statute. *See United States v. Lanier*, 520 U.S. 259, 266 (1997) (distinguishing the problem of vagueness from "applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope"). The question under this Court's fair warning jurisprudence is whether it was clearly established at the time Petitioner aired his program that his conduct was criminal under the indecent exposure statute. *Id.* at 270-71. The answer is plainly no: although the statute may have given Petitioner fair warning that exposing oneself in a public place is criminal, the statute did not give him fair warning that he could be criminally liable for displaying nude images on television. Pet. at 24-26.

In an attempt to avoid this inevitable conclusion, the State resorts to the tautology of assuming that Petitioner violated the statute, and then concluding that, as a result, Petitioner must have had fair warning that his conduct was criminal. Opp. at 17. The proper question, however, is "whether the statute, either standing alone or as construed, made it reasonably clear *at the relevant time* that the defendant's conduct was criminal." *Lanier*, 520 U.S. at 267

(emphasis added). Respondent does not even attempt to argue that the text or prior judicial interpretations of the statute gave Petitioner such fair warning. To the contrary, Respondent concedes that "[t]he statute has been generally applied to exposures in the public," Opp. at 4, which is how the Michigan courts had consistently interpreted the statute, Pet. at 25. Particularly in light of this Court's decisions recognizing significant First Amendment protection for "indecent" expression on cable and in other media, Petitioner could not have predicted that he could be subject to criminal penalties for the airing of his cable program.

The State's efforts to distinguish *Rabe v. Washington*, 405 U.S. 313 (1972) (per curiam), are unavailing. Opp. at 17-18. In *Rabe*, as in this case, the court interpreted a criminal statute in a novel and unforeseeable way, expanding its scope to cover an activity the statute had not reached before. That *Rabe* involved an obscenity conviction and that this case does not is an immaterial distinction. *See* Opp. at 17. Both Rabe's and Petitioner's convictions were "affirmed under a statute with a meaning quite different from the one [each of them] was charged with violating." *Rabe*, 405 U.S. at 315 (per curiam). Petitioner's conviction, like Rabe's, should be summarily reversed. Pet. at 27-28.

CONCLUSION

For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted and the case set down for plenary hearing on the merits or, alternatively, the conviction should be summarily reversed.

Respectfully submitted,

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No. 05-1449

In the Supreme Court of the United States

OCTOBER TERM, 2005

TIMOTHY B. HUFFMAN,

Petitioner,

v.

THE PEOPLE OF THE STATE OF MICHIGAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

BRIEF OF *AMICI CURIAE* ALLIANCE FOR COMMUNICATIONS DEMOCRACY AND ALLIANCE FOR COMMUNITY MEDIA IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Constitutional Provisions

U. S. Const. amend. I ..... *passim*

Federal Statutes

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47 U.S.C. § 521(4) 4

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Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385,106 Stat. 1460 (1992), codified as amendments to Title VI of the Communications Act of 1934 8

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Sup. Ct. R. 37.6 1

Other Authorities

Alliance for Community Media, *About Community Media, Quick Facts on Media Access,* http://www.alliancecm.org/index.php?page_id=2 (last visited June 12, 2006) 4

Patricia Aufderheide, *Public Access Cable Programming, Controversial Speech and Free Expression* (Center for Social Media, School of Communications, American University, 1992) 16

Capital Community Television Rules and Procedures Handbook (March 2005), *available at* http://www/cctvsalem.org/pdfs/rules_procedures.pdf 5, 6

Ralph Engelman, *The Origins of Public Access Cable Television 1966-1972*, Journalism Monographs, No. 123 (Oct. 1990) 3

GRTV, *GRTV Rules and Policies*, § 10, *available at* http://grtv.org/policies.html (last visited June 12, 2006) 5

GRTV, Welcome to GRTV, Cable Channel 25, available at http://grtv.org/index.html (last visited June 12, 2006) 5

John Montez & Teresa Neumann, *Michigan Fighting Nudity on Cable TV* (March 3, 2006), http://www.injesus.com/index.php?module =message&task=view&MID= ET00ANN5&GroupID=0B001BSP 19

Margie Nicholson, *Cable Access: A Community Communications Resource for Nonprofits,* Bulletin 3 (Benton Foundation, Washington D.C. April 1990) 4, 16

Seattle Community Access Network, *User Handbook available at* http://scantv.org/Policy.htm (last visited June 12, 2006) , ... 5

Nancy Van Valkenberg, *KSL passes on NBC's risque comedy,* Standard-Examiner (Oct. 10, 2002), http//www.puppetryofthepenis.com/ download/pop%20Standard%20Examiner%20News %20.pdf..... 19

Eugene Volokh, *It's a Crime for Cable Companies to Offer HBO in Michigan*, The Volokh Conspiracy (May 23, 2005, updated May 28, 2005), http://volokh.com/archives/archive_2005_05_22-2005_05_28.shtml 18

Pete Winn, *Michigan Court: TV Indecency the Same as Indecent Exposure*, Focus on the Family, citizenlink.org (February 27, 2006), *available at* http://www.family.org/cforum/news /a0039672.cfm 19

INTEREST OF *AMICI CURIAE*

At issue in this case is the unprecedented criminal conviction of a public access cable television programmer under a state indecent exposure law based on the content of his non-obscene, constitutionally protected cable television programming. [1]

In *Denver Area Educ. Telcoms. Consortium v. FCC*, 518 U.S. 727, 760-66 (1996), this Court struck down, as contrary to the First Amendment, a federal statute allowing cable operators to censor non-obscene, indecent programming on cable access channels. In doing so, the Court recognized the long history of effective community regulation of the time, place and manner of constitutionally protected speech on cable system public access channels. Even more than the cable operator censorship of "indecent" access programming struck down in *Denver Area*, Michigan's use of a state indecent exposure statute to criminalize nudity on cable television would, if allowed to stand, "radically change present programming-related relationships among local community and nonprofit supervising boards and access managers," and would "greatly increase the risk that certain categories of programming (say, borderline offensive programs) will not appear." *Id.* at 766.

As the primary national membership organizations representing public access community supervising boards,

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been lodged with the Clerk of the Court. Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amici*, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

access managers, and public access programmers and viewers, the interests of the *amici,* Alliance for Community Media ("ACM") and Alliance for Communications Democracy ("ACD"), are directly implicated by the Michigan court's radical departure from settled First Amendment law.

ACM is a national non-profit member organization representing over 3,000 Public, Educational and Governmental ("PEG") access organizations, community media centers, programmers, and viewers throughout the nation. Those centers include the more than 1.2 million volunteers and 250,000 community groups that provide PEG access television programming in local communities across the United States. ACD is a national membership organization of nonprofit access corporations in communities across the country. The organizations represented by *amici* have helped thousands of members of the public make use of public access channels that have been established in their communities pursuant to local franchise agreements and federal law, 47 U.S.C. § 531.

ACD and ACM filed amicus briefs below before the circuit court, court of appeals and Supreme Court of Michigan in support of Huffman in this case. In addition, ACD and ACM have participated as parties or *amicus curiae* in a wide range of cases involving First Amendment issues important to the public access community. Most notably, ACD and ACM were petitioners in the *Denver Area* case, which the decision below directly undercuts.

Because of their substantial experience and interest in issues relating to public access and their unique understanding of the dangerously broad ramifications of the

decision below, *amici* are well situated to assist the Court in its consideration of this case.

The application of a public indecency statute to ban and criminalize non-obscene cable programming will chill constitutionally protected speech on public access. If the decision below is not reviewed and overturned by this Court, that chilling effect will not be confined to Michigan. Groups advocating greater morality in television view the decision below as a springboard for urging other states to construe their public indecency laws in a similar manner. This Court's review is therefore warranted.

INTRODUCTION

For five decades, public access channels have provided a public forum for those who otherwise would have no means to communicate via cable television, a medium that "stands at the center of an ongoing telecommunications revolution with still undefined potential to affect the way we communicate and develop our intellectual resources." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 627 (1994).

Public access has its origins in the 1960s, when a small number of cable systems began transmitting programming provided by local citizens. *See generally* R. Engelman, *The Origins of Public Access Cable Television 1966-1972*, Journalism Monographs, No. 123 (Oct. 1990). Over time, municipalities responded to citizen desires for a "direct right of access" to the cable medium through franchise agreements requiring cable operators to reserve channel capacity for PEG channels as part of the consideration they give for access to public rights of way. *See* H.R. Rep. No. 98-934, at 30 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4667 ("*1984 House Report*").

In 1984, Congress enacted the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984), *codified as* Title VI of the Communications Act of 1934, 47 U.S.C. §§ 521 *et seq.* (2000) ("the 1984 Act"). To further the goal of providing "the widest possible diversity of information sources and services to the public," 47 U.S.C. § 521(4), the 1984 Act ratified local governments' authority to require cable operators to provide channels for public access as a condition for franchise approval, 47 U.S.C. § 531(b), and prohibited operators from "exercis[ing] any editorial control over any" constitutionally protected expression appearing on access channels, 47 U.S.C. § 531(e). Federal law thus affirmed the role of public access channels to "provide groups and individuals who generally have not had access to the electronic media with the opportunity to become sources of information in the electronic marketplace of ideas." *1984 House Report*, at 30.

Today, thousands of community groups and over one million volunteer producers, directors, presenters and technical staff participate in the production of more than 20,000 hours of new local programming each week, more than all the programming produced by NBC, CBS, ABC, Fox and PBS combined.[2] Consistent with the purpose of public access channels as open forums for citizen speech, franchises or local regulations traditionally provide that the channels

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[2] Alliance for Community Media, *About Community Media, Quick Facts on Media Access, available at* http://www.alliancecm.org/index.php?page_id=2 (last visited June 12, 2006). Public access stations reach approximately 30 million homes and 70 million people. Margie Nicholson, *Cable Access: A Community Communications Resource for Nonprofits*, Bulletin 3 (Benton Foundation, Washington D.C., April 1990) at 7.

may be used by the general public on a nondiscriminatory basis for any non-commercial, constitutionally protected programming.[3] In practice, given court rulings in the area of cable programming, franchising authorities prohibit obscene, but not indecent, cable programming.

Public access boards and franchising authorities also have taken additional steps, appropriate to their communities, to regulate the time, place and manner of indecent or otherwise potentially offensive cable programming. As the Court summarized in *Denver Area,* public access channels "are normally subject to complex supervisory systems of various sorts, often with both public and private elements." 518 U.S. at 761. Most franchising authorities require public access cable programmers to sign an agreement not to disseminate any material containing obscenity and to require that programming intended for adult audiences be channeled into one or more late night time slots during which children are not expected to be watching.[4] Access managers may also

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[3] *See, e.g.*, GRTV, *Welcome to GRTV Cable Channel 25*, *available at* http://grtv.org/index.html ("GRTV provides a forum for legal, non-commercial speech, a place where you can express yourself creatively at little or no cost.") (last visited June 12, 2006); *see also, e.g.*, Seattle Community Access Network, User Handbook, *available at* http://scantv.org/Policy.htm ("SCAN provides channel access for non-commercial, constitutionally protected programming.") (last visited June 12, 2006).

[4] *See, e.g.*, GRTV, *GRTV Rules and Policies*, § 10k, *available at* http://grtv.org/policies.htm#programming (sponsor of programming should notify the Programming Department that a program contains adult content and the program "should air between the hours of 10:00 pm and 6:00 am"); *Capital Community Television Rules and Procedures Handbook* at p. 6 (March 2005) ("*Capital Community Handbook*"), *available at* http://www.cctvsalem.org/pdfs/rules_procedures.pdf (limiting TV14 programs to a time slot between 11 pm and 5 am and TVMA programs to between 1:00 am and 4:00 am).

require programming to contain ratings or other adult content advisories.[5] This Court, in *Denver Area*, recognized the efficacy of these locally governed systems for the oversight of constitutionally protected speech on access channels:

> Whether these locally accountable bodies prescreen programming, promulgate rules for the use of public access channels, or are merely available to respond when problems arise, the upshot is the same: There is a locally accountable body capable of addressing the problem, should it arise, of patently offensive programming broadcast to children, making it unlikely that many children will in fact be exposed to programming considered patently offensive in that community.

518 U.S. at 763 (internal citations omitted).

And, in fact, the process followed by the public access channel here worked precisely as the *Denver Area* Court contemplated: Petitioner Huffman's show was cablecast at 10:30 P.M in the evening, consistent with the local public access organization's time segregation policy. *See* Huffman Pet. at 2 and note 4 *supra*.

REASONS FOR GRANTING THE WRIT

The court of appeals' sanctioning of the use of a public indecency statute to ban, and criminalize, non-obscene cable programming containing nudity that offends a single viewer, even if the programming is time segregated, is an "obvious" error in light of *Denver Area* and *United States v.*

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[5] *See, e.g., Capital Community Handbook* at 6.

Playboy Entertainment Group, 529 U.S. 803 (2000), and summary reversal is therefore appropriate. *Gonzales v. Thomas*, 126 S.Ct. 1613, 1615 (2006). But in any event, review is appropriate. Otherwise, the chilling effect of criminal liability spawned by the decision below will inevitably spread to public access programmers, and to other cable programmers, nationwide.

I. THE DECISION BELOW IS DIRECTLY CONTRARY TO CLEAR AND CONTROLLING FIRST AMENDMENT RULINGS OF THIS COURT.

Certiorari is appropriate in this case because the decision of the Court below is in direct conflict with clear and controlling precedent of this Court[6] establishing that (1) the complete banning of constitutionally protected, indecent programming on cable television violates the First Amendment, *Playboy*; *Denver Area*; and (2) the application of facially content-neutral statutes to criminalize the distribution of film or television programming containing nudity is an impermissible content-based restriction on speech, not content-neutral regulation of expressive conduct, *see, e.g., Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975). Michigan's prohibition of indecent speech on cable television through imposition of "the opprobrium and stigma of a criminal conviction," *Reno v. ACLU*, 521 U.S. 844, 872

[6] *See* Sup. Ct. R. Rule 10 (c) (review on writ of certiorari may be appropriate if "a state court . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court"); *Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 362 (1984) ("We are concerned with federal issues and a contention that a state court disregarded a federal constitutional ruling of this Court.").

(1997), cannot survive the strict scrutiny applicable to content-based regulation of "offensive" cable programming.

A. This Case is Clearly Controlled by *Playboy* and *Denver Area*. This Court has twice struck down governmental efforts to ban indecent programming on cable television because cable programming is speech protected by the First Amendment.

In *Denver Area*, this court struck down a provision in the Cable Television Consumer Protection and Competition Act of 1992[7] that permitted cable operators "to prevent transmission of 'patently offensive' programming ... on public access channels." 518 U.S. at 760. "Patently offensive" programming was defined to include that which "describes or depicts sexual or excretory activities or organs in a patently offensive manner." *Id.* at 732. The Court recognized "the basic, legitimate objective of protecting children from exposure to 'patently offensive' material," *id.* at 733, but held that a ban on indecent programming is not appropriately tailored to achieve that end because "time segregation [and] adult content advisories" offer less restrictive means of protecting children from indecent programming on public access. *Id.* at 762; *see also id.* at 756 (discussing availability of lock boxes to block public access channels at the subscriber's request).

The Court visited the issue again in *Playboy*, which considered a congressional effort to prohibit cable operators from allowing indecent images from adult channels to be viewable during daytime hours through "signal bleed." 529 U.S. at 808. In striking down that congressional enactment,

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[7] Pub. L. No. 102-385, 106 Stat. 1460 (1992), *codified as* amendments to Title VI of the Communications Act of 1934.

the Court held that the First Amendment standard for assessing content-based restrictions on indecent cable programming is "clear: The standard is strict scrutiny." *Id.* at 814. The Court further held that indecent cable programming is protected speech, not conduct, under the First Amendment, *id.*; that legislation targeting such speech is content-based regulation, *id.*; and that the broadcast indecency standard of *FCC v. Pacifica Foundation,* 438 U.S. 726 (1978), does not apply to cable programming, 529 U.S. at 815.

At the heart of the many errors made by the court below is its effort to sidestep *Playboy* and *Denver Area* by equating images of conduct depicted in a cable program to conduct rather than speech.[8] The court of appeals' wrong turn on the speech-versus-conduct question led it down the mistaken path of concluding that the First Amendment "issue is governed by a case concerning draft card burning ... and two cases [involving] nude dancing," *Huffman*, 266 Mich. App. at 362 (citations omitted), and therefore subject to intermediate scrutiny, rather than the strict scrutiny standard compelled by *Playboy.* The court compounded its error by concluding that the broadcast standard of *Pacifica* "applies to cable television broadcasting," such that cable programming, like broadcast, has "the most limited First Amendment protection," *id.* at 368 (quoting *Pacifica*, 438 U.S. at 748), despite this Court's explicit rejection of that proposition in *Playboy*, 529 U.S. at 815. Based on this series of errors, the court below held that Michigan may completely ban and

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[8] *People v. Huffman*, 266 Mich. App. 354, 368 (2005), *appeal denied*, 474 Mich. 999 (2006) (distinguishing *Playboy* and *Denver Area* as "simply inapposite to the question presented in this appeal" because those cases involved "content-specific restrictions on speech itself," rather than "content-neutral restrictions on expressive conduct that constitutes symbolic speech").

punish, through its criminal law, the production and dissemination of images of nudity on cable television based on nothing more than a single adult viewer's finding of such images offensive. *Huffman*, 266 Mich. App. at 359-61.

The Michigan Court of Appeals' holding that criminalizing the "produc[tion] and arrange[ment] for the cable transmission of a television show" is "expressive conduct," not speech, *Huffman*, 266 Mich. App. at 356, 369, defies five decades of this Court's First Amendment jurisprudence. It has been clear since this Court's decision in *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-502 (1952), that distributing film is a form of speech subject to the full protection of the First Amendment,[9] not expressive conduct that "falls only within the outer ambit of the First Amendment's protection."[10] The same protection long accorded to film shown in movie theaters extends to television programs shown on cable channels. "Cable programmers . . . engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment." *Turner*, 512 U.S. at 636. This Court has never held that the production or dissemination of film or television programming is anything other than pure speech. It has never suggested that such programming

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[9] *Burstyn* involved an appellant "engaged in the business of distributing motion pictures" who was prevented from distributing an Italian film in New York that was judged by a review board to be "sacrilegious." 343 U.S. at 497-98.

[10] *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000) (citation omitted). *Cf. Jenkins v. Georgia*, 418 U.S. 153 (1974) (reversing conviction under statute making it a "crime to exhibit a motion picture portraying acts which would constitute 'public indecency' . . . if performed in a public place").

becomes conduct because of the content of the conduct it depicts.

The court of appeals' holding that the enforcement of a general criminal law to ban indecent speech on cable television is "content-neutral" is similarly at odds with decades of this Court's established precedent. Whatever the law says on its face, the obligation of this Court is to review Michigan's indecent exposure statute "as construed and applied" by the state. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). *Accord Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 131 (1992). As construed and applied by Michigan's prosecution authorities and courts, its indecent exposure law does more than ban nudity in public places; it now criminalizes "televising an image" that would constitute an indecent exposure if "staged . . . in a traditional 'public square,' like Grand Rapids' downtown Calder Plaza." *Huffman*, 266 Mich. App. at 360.

The enforcement of a general conduct law to criminalize offensive speech is a content-based restriction on speech subject to strict scrutiny under the First Amendment. Thus, when the City of Jacksonville sought to use its general nuisance law "to protect its citizens against unwilling exposure" to potentially "offensive," but not obscene, images of nudity visible from a drive-in theater, the Court treated the application of that nuisance law as a content-based regulation of speech, not under the *O'Brien* standard[11] applicable to content-neutral regulations of expressive conduct. *Erznoznik*, 422 U.S. at 208. Similarly, the Court rejected the efforts of the plaintiff in *Hustler Magazine v. Falwell* to evade strict scrutiny under the First Amendment by fashioning his action

[11] *United States v. O'Brien*, 391 U.S. 367 (1968).

for the punishment of protected speech as one for intentional infliction of emotional distress rather than libel.[12]

The Court's holdings in this area are clear: whether under the guise of a law that facially regulates the content of speech, or through enforcement of a general law making no reference to speech or its content, "when the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power." *Erznoznik,* 422 U.S. at 209.

The court below sanctioned this very kind of censorship. Indeed, it applied Michigan's indecent exposure statute to Huffman's program *precisely because* "a televised exposure . . . can be more offensive and threatening" than an in-person exposure, and, "therefore, powerfully effective."[13] This focus on the reaction of the viewer to the speech is the hallmark of a content-based regulation. "The overriding justification [for Petitioner's conviction under this statute] is concern for the effect of the subject matter" on viewers. *Playboy,* 529 U.S. at 811. "This is the essence of content-based regulation." *Id.* at 812. Cases such as Huffman's,

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[12] 485 U.S. 46, 53 (1988) ("Were we to hold otherwise, there can be little doubt that political cartoonists and satirists would be subjected to damages awards without any showing that their work falsely defamed its subject.").

[13] *Huffman*, 266 Mich. App. at 360-61, Huffman was not convicted under Michigan's indecent exposure law for exposing his penis in what is conventionally considered a public place, *e.g.*, on the streets or sidewalks, on public transportation or in a place of public accommodation. Huffman was convicted for "producing and submitting the Dick Smart tape for cable distribution." *id.* at 359, 362 (explaining that "no one allegedly observed the taping or took offense because of it").

where the government seeks to punish a cable programmer for showing indecent cable programming, "involve[] speech alone," *Playboy*, 529 U.S. at 814, and therefore are subject to strict scrutiny.

B. Huffman's Conviction Cannot Survive the Required Strict Scrutiny under This Court's Precedent. Content-based regulation of speech is "presumptively invalid," and "[i]t is rare that a regulation restricting speech because of its content will ever be permissible." *Id.* at 817 & 818. "If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest." *Id.* at 813. Under this Court's precedent, Huffman's conviction cannot survive strict scrutiny.

As an initial matter, the State disclaimed any government interest that could be classified as compelling. It conceded below that "[t]he People do not assert an interest in protecting children as a justification for the indecent exposure statute generally or this prosecution in particular."[14] The court below similarly held that "the governmental interest served by the text of the [indecent exposure] prohibition" is not the protection of children, but "societal disapproval of nudity in public places and among strangers." *Huffman*, 266 Mich. App. at 366 (quoting *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 571-572 (1991)).

The only compelling governmental interest that this Court has ever recognized for the suppression of First Amendment-protected speech based on its "offensive" content is the need to protect unsupervised children from

[14] Answer in Opposition to Defendant's Motion to dismiss at 8, filed with the trial court on April 9, 2001.

exposure to indecent material. *See Denver Area*, 518 U.S. at 743. Societal disapproval of unwelcome images of nudity in cable television programming is not a compelling state interest justifying the suppression of such speech. "Where the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails . . . ." *Playboy*, 529 U.S. at 813. "In evaluating the free speech rights of adults," this Court has "made it perfectly clear that '[s]exual expression which is indecent but not obscene is protected by the First Amendment.'" *Reno*, 521 U.S. at 874 (quoting *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989)).[15]

Moreover, the total banning, and criminalization, of indecent programming even at the late night hours when Huffman's broadcast aired, are the antithesis of narrow tailoring.[16]

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[15] *See also Denver Area*, 518 U.S. at 807 (government may not "reduce the adult population . . . to . . . only what is fit for children") (internal quotation marks omitted) (quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957)); *Boos v. Barry*, 485 U.S. 312, 322 (1988) ("As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment" (internal quotation marks and citations omitted); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 74 (1983) ("the level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox"); *Pacifica* 438 U.S. at 745 ("the fact that society may find speech offensive is not a sufficient reason for suppressing it"); *Carey v. Population Services Int'l*, 431 U.S. 678, 701 (1977) ("Where obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression").

[16] Although governments may regulate the time, place and manner of constitutionally protected speech, "even where speech is indecent and

II. IF NOT REVIEWED AND REVERSED BY THIS COURT, THE DECISION BELOW WILL SPAWN WIDESPREAD CHILLING OF CONSTITUTIONALLY PROTECTED CABLE PROGRAMMING.

A second compelling reason for granting certiorari in this case is the broad potential chilling effect of the decision below on public access programmers and other cable programmers, not only in Michigan but elsewhere across the country.

This Court has often recognized that criminal sanctions are an intolerably blunt weapon for regulating protected speech, and that their strong deterrent effect "may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images."[17]

Public access programmers produce programming that involves images of nudity that would almost certainly be

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enters the home, the objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative." *Playboy*, 529 U.S. at 813-814. *See also Denver Area,* 518 U.S. at 820 (Thomas, J., Rehnquist, C.J., and Scalia, J., concurring in part, dissenting in part) ("Certainly, under our current jurisprudence, Congress could not impose a total ban on the transmission of indecent programming."); *Sable Communications*, 492 U.S. at 127 ("*Pacifica* is readily distinguishable from these cases . . . because it did not involve a total ban on broadcasting indecent material"); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976) ("the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value").

[17] *Reno,* 521 U.S. at 872 (concluding that criminal sanctions in the Communications Decency Act "poses greater First Amendment concerns than those implicated by the civil regulation reviewed in *Denver Area*").

illegal in Michigan if the same material were staged live in the public square. This programming might include, for example: "Beyond the Loss of the Breast," an award-winning documentary about breast cancer victims that was shown on Palo Alto's public access channel; a video of a home birth shown in Amherst, Massachusetts; Cambridge Community Television's cablecast of a program entitled "Truth or Consequences: A Guide to Safe Sex at MIT"; "Health in America," a monthly Sacramento program that discusses alternative health-care options and has included images of women with mastectomies and damaged breast implants; and the "HealthVisions" series, produced by Good Samaritan Hospital and Medical Center of Portland, Oregon, which has included programs entitled "PMS: Breaking the Cycle" and "Understanding Impotence: A Common and Treatable Problem."[18] This Court has noted the existence of other examples of programs containing nudity that some individuals certainly could find offensive, but nonetheless are clearly constitutionally protected speech, including depiction of a self-help gynecological examination, nude scenes in a movie, and a safe sex program. *Denver Area,* 518 U.S. at 765-66.

If Michigan's use of its public indecency statute to criminalize nudity on cable television were allowed to stand, the effects are unlikely to be confined to Michigan. This Court noted in *Barnes* that public indecency regulations trace their origin to the common law and exist in at least 47 states.

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[18] *See* Patricia Aufderheide, *Public Access Cable Programming, Controversial Speech, and Free Expression* (Center for Social Media, School of Communication, American University, 1992); Margie Nicholson, *Cable Access: A Community Communications Resource for Nonprofits*, Bulletin 3 (Benton Foundation, Washington D.C., April 1990).

501 U.S. at 568. Much like the Michigan statute at issue here, a common formulation of the crime of indecent exposure in other states requires that the exposure occur "under circumstances" in which the conduct is likely to cause "affront" or "alarm."[19] Other laws broadly prohibit exposures of nudity in any place where others have "access,"[20] where the exposure "may reasonably be expected to be viewed" by others,[21] or even where the exposure can be seen from the private premises of another.[22] Thus, the indecent exposure

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[19] *See* DEL. CODE ANN. tit. 11 §764-765 (2006); KY. REV. STAT. ANN. § 510.148 (2005); ME. REV. STAT. ANN. tit. 17A, § 854 (2006) ; MONT. CODE ANN. § 45-5-504 (2005); N.H. REV. STAT. ANN. §645:1 (2006); 18 PA. CONS. STAT. ANN. § 3127 (West 2000); R.I. GEN. LAWS §11-45-1 (2005); UTAH CODE ANN. § 76-9-702 (2005); W. VA. CODE ANN. § 61-8-9 (West 2006); *see also* HAW. REV. STAT. § 707-734 (2005) (criminalizing exposure "under circumstances in which the actor's conduct is likely to cause affront"); N.J. STAT. ANN. §2C:14-4 (2006) (criminalizing exposure where person "knows or reasonably expects is likely to be observed by other nonconsenting persons who would be affronted or alarmed"); S. D. CODIFIED LAWS § 22-24-1.2 (2005) (under circumstances ... likely to annoy, offend, or alarm); *see also* WASH. REV. CODE §9A.88.010 (West 2006) ("... knowing that such conduct is likely to cause reasonable affront or alarm"). ARK. CODE. ANN. § 5-14-112 (West 2006); COLO. REV. STAT. ANN. § 18-7-302 (West 2006) (same).

[20] TENN. CODE. ANN. § 39-11-106 (West 2006).

[21] CONN. GEN. STAT. ANN. §53a-186 (West 2001 & 2006 Supp.); GA. CODE ANN. § 16-1-3 (West 2005); *see also* LA. REV. STAT. ANN. §14:106 (2006) (criminalizing exposure in "any public place or place open to the public view"); N.M. STAT. ANN. § 30-9-14 (West 2006) (criminalizing exposure "to public view").

[22] ALA. CODE § 13A-6-68 (2005); FLA. STAT. ANN. § 800.03 (West 2006) (same); ME. REV. STAT. ANN. tit. 17-A, § 854 (2006) (same); N.Y. PENAL LAW § 245.00 (McKinney 2006) (same); OR. REV. STAT. ANN. § 163.467 (2003) (exposure illegal "where another person has a reasonable expectation of privacy").

laws of many states are highly susceptible to the same interpretation as that adopted by the court below: to reach televised images distributed "under circumstances which create a substantial risk that someone might be offended." *Huffman*, 266 Mich. App. at 360 (quoting *People v. Vronko*, 228 Mich. App. 649, 656 (1998)).

Nor is the decision below necessarily limited to programming on public access channels. Noted First Amendment scholar Eugene Volokh has concluded that the sweep of the reasoning of the court below "would apply equally to any cable company that carries HBO, or any other channel that sometimes carries nudity."[23]

There is ample reason to believe that prosecutors in other states will be urged to follow Michigan's lead.

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[23] Eugene Volokh, *It's a Crime for Cable Companies to Offer HBO in Michigan*, The Volokh Conspiracy (May 23, 2005 updated May 28, 2005), http://volokh.com/archives/archive_2005_05_22-2005_05_28.shtml (May 28, 2005). Professor Volokh added:

> Under the court's logic, the company — corporations are generally treated as "persons" — and those working for it are making "open or indecent exposure . . . of the person of another." Likewise, HBO executives, who surely must know that their material would be carried in Michigan, would probably be committing a crime.

Id. This risk is not hypothetical. HBO has televised a 20 minute segment of clips from the international traveling show, "Puppetry of the Penis," featuring two men who "manipulate their male organs into a variety of shapes including that of the Eiffel Tower, the Loch Ness monster, a wind-surfing sail and a hamburger." Nancy Van Valkenburg, *KSL passes on NBC's risque comedy*, Standard-Examiner (Oct. 10, 2002), *available at* http://www.puppetryofthepenis.com/download/pop%20Standard%20Examiner%20News%20/pdf.

Advocacy groups are already mobilizing to "encourage the state Attorney General to enforce indecency law on cable television by using state law" to prohibit all nudity on cable television.[24] These groups see Michigan as "pioneering what could be a new approach to the prosecution of indecent material on cable television" that will allow state law to "be used to reach national broadcasters on cable TV who put out indecent material."[25]

If the decision below is allowed to stand, access programmers around the country that cablecast any non-obscene programming that includes nudity, even if time segregated, will face the risk of criminal prosecution under public indecency laws. It is difficult to imagine a more direct and pervasive chilling effect on protected speech. Such a chilling effect is anathema to this Court's First Amendment jurisprudence, and this Court's review is therefore warranted.

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[24] Josh Montez & Teresa Neumann, *Michigan Fighting Nudity on Cable TV* (Mar 3, 2006), http://www.injesus.com/index.php?module=message&task=view&MID=ET00ANN5&GroupID=0B001BSP.

[25] Pete Winn, *Michigan Court: TV Indecency the Same as Indecent Exposure*, Focus on the Family, citizenlink.org (February 27, 2006), http://www.family.org/cforum/news/a0039672.cfm.

CONCLUSION

This case merits summary reversal in light of the Court's decisions in *Playboy* and *Denver Area*. Alternatively, the Court should grant the writ and entertain full briefing on the important constitutional issues at stake. Allowing Huffman's conviction to stand would cast a pall over cable programmers across the nation who will be deterred from airing potentially offensive speech for risk of criminal prosecution.

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